

ORIGINAL

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

2010 JAN 27 PM 2:09

IN AND FOR THE COUNTY OF YAVAPAI

CLERK ✓

B. Hamilton

BY: _____

THE STATE OF ARIZONA,)

Plaintiff,)

vs.)

STEVEN CARROLL DEMOCKER,)

Defendant.)

91300
No. CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
FRIDAY, JANUARY 22, 2010
8:59 A.M.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HEARING ON MOTIONS
TESTIMONY OF CAPTAIN JAIME CICERO

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

JANUARY 22, 2010
8:59 A.M.

HEARING ON MOTIONS

APPEARANCES:

FOR THE STATE: MR. JACK FIELDS, MR. DENNIS
MCGRANE, AND MR. JOE BUTNER APPEARING TELEPHONICALLY.

FOR THE DEFENDANT: MR. JOHN SEARS, MR. LARRY
HAMMOND, AND MS. ANNE CHAPMAN.

THE COURT: This is State of Arizona versus
Steven Carroll DeMocker, CR 2008-1339. Mr. DeMocker is
present with his attorneys, and Mr. McGrain and Mr. Fields
are here on behalf of the County Attorney's Office.

I had issued an order, I believe it was
January 12th, in connection with circumstances at the Yavapai
County Jail and Mr. DeMocker's being held there. Mr. Butner
was representing the State at that time. A proposed form of
order was then prepared, approved as to form by the County
Attorney's Office by Mr. Butner. In fact, signed that on
January 13, 2010.

I was then asked by the Yavapai County
Sheriff, represented by Jack Fields of the Yavapai County
Attorney's Office, to reconsider the order that had been
issued. And I essentially can't consider that without
allowing the parties an opportunity to be heard in connection
with that. So I did authorize a response to the request for
reconsideration.

1 The defense filed a memorandum, and the
2 State filed a brief memorandum, as well.

3 Parties prepared to proceed on the issues
4 regarding reconsideration of the order, Mr. Sears?

5 MR. SEARS: Yes, Your Honor.

6 THE COURT: Mr. Fields?

7 MR. FIELDS: Yes, Your Honor.

8 THE COURT: Mr. Sears.

9 MR. SEARS: Thank you. Well, this is, I
10 guess, an amazing moment in this case, and we seem to have
11 been moving from one amazing moment to another over the past
12 few weeks. Let me see if I can understand what has happened
13 here, Your Honor.

14 We had filed a motion for reconsideration
15 of Mr. DeMocker's release conditions in the middle of last
16 year and had suggested, at that time, among the reasons that
17 the Court might consider revisiting the release conditions
18 were his conditions of confinement in the jail. And we made,
19 in a general way, many of the same points that we tried to
20 make in much more detail now. After the response in that
21 case was filed in which the State took the position that they
22 could make and would make accommodations to Mr. DeMocker to
23 allow him principally to have access to a computer, there
24 were efforts made between the defense and the prosecution to
25 see about bringing those promises to bear.

1 As late in the game as December 2nd, I
2 wrote a letter to Mr. Butner, which you have now, because it
3 was attached to one of our pleadings recently, in which I
4 said we have been going for months now, Mr. DeMocker has been
5 without access to his case materials. Here are the things
6 that we think, in specific terms, are necessary for him to be
7 able to exercise his rights under the Sixth Amendment, for
8 meaningful assistance of defense. And that letter was never
9 responded to, and it prompted the hearings, which this Court
10 conducted on yet another motion to modify his conditions of
11 release, this time targeted almost entirely on the conditions
12 in the jail.

13 And we had a proceeding on the 12th, as
14 you just told us, in which Mr. Butner, on behalf of the
15 State, made certain representations about what he had been
16 told by jail administration that they would be willing to do.
17 Again, principally among them, that they would allow
18 Mr. DeMocker access to a computer. But their position at
19 that time was that the computer would be one of their jail
20 computers and not a computer that we brought in. But they
21 drew the line at providing Mr. DeMocker contemporaneous
22 telephone access to confer with his attorneys and his defense
23 team. And that is what's brought us here today.

24 But what has changed in the interim is
25 that the sheriff's position has once again changed course.

1 Now the sheriff is saying that whomever told Mr. Butner that
2 the jail would permit computer access either didn't have
3 authority to do it, or if they had authority, that authority
4 is now withdrawn.

5 So this is what I think is the sheriff's
6 position in this case. The sheriff will not agree,
7 apparently, to allow Mr. DeMocker to have access to any
8 computer -- whether it is their computer or the computer that
9 you ordered, which would be one that we provide that would be
10 loaded with the defense materials, the disclosure, and the
11 appropriate software, principally a program that would allow
12 all of this material to be searched and organized in a
13 reasonable way.

14 They will not allow him to have a private
15 room. They will not allow him to have access to any other
16 telephone, other than the telephone inside his dorm inside
17 the jail. And they say the following things -- and this is
18 the amazing part to me.

19 They say now that, contrary to what
20 Mr. DeMocker has been repeatedly told by detention officers,
21 he could have up to two boxes of paper in his cell at any one
22 time. And for the first time, they suggested that they would
23 store another dozen boxes of paper, depending on how many
24 pages you can get in there -- perhaps somewhere approaching
25 25,000 pages of disclosure. And that we could trust the jail

1 staff to essentially be librarians, again, for Mr. DeMocker.
2 And whenever and however often he needed to have materials
3 switched out, as long as he didn't have in his cell in the
4 aggregate more than two boxes, they would ship these
5 documents back and forth.

6 Then they propose that Mr. DeMocker
7 conference with his defense team, again using these
8 telephones. And just to remind the Court, our understanding
9 from our client and from previous representation from people
10 in the jail is that there are three telephones available in
11 each of these dorms for inmate use, and there are roughly, at
12 any time, about 40 inmates that use them. So the suggestion
13 in their briefing memorandum that this is somehow
14 Mr. DeMocker's phone doesn't take that fact into account.

15 The phones are clearly not private. They
16 are located near the televisions, which are running all the
17 time. There is no place for Mr. DeMocker to sit down. And
18 it is preposterous to suggest that that's a reasonable
19 accommodation to allow Mr. DeMocker to work with his defense
20 team, using his papers, even if it was the two boxes that he
21 would be limited to.

22 And in addition, it has come to our
23 attention, through disclosure in this case, that at least two
24 individuals have decided that they've heard enough from
25 Mr. DeMocker, most likely over these telephone calls, that

1 they want to become informants and trade information about
2 Mr. DeMocker and his case for favorable treatment in their
3 own cases. So to suggest that this is a reasonable place for
4 Mr. DeMocker to have confidential telephone conversations
5 makes absolutely no sense, and I am surprised, frankly, that
6 they put that in writing in advance as an alternative.

7 They also propose that we use the
8 video-conferencing system that the public defender has set
9 up, two to three hours a day. Let me just speak to that for
10 a moment.

11 I have told the Court on more than one
12 occasion that I have tried to use, at the very beginning of
13 the case, that video system. This is the way it works. I
14 would have to go to the public defender's office. They have
15 agreed that, even though I am not a public defender or a
16 contract attorney, out of consideration for us and the case,
17 they've agreed that we could use the system.

18 The two to three hours per day is for all
19 of the incarcerated defendants and their public defenders.
20 It has to be booked in advance in half-hour increments. And
21 it is not possible -- it was not possible during the time
22 that I did it to take more than one, possibly two 30-minute
23 sessions per week. And so the idea that we could use their
24 system and monopolize it five days a week or seven days a
25 week for two or three hours is not true.

1 In addition, on the other end, in the
2 jail end, Mr. DeMocker is brought to a small room off the old
3 courtroom that was built in the jail, when early disposition
4 court was a smaller proposition. I've told the Court about
5 my real concerns about the confidentiality, but he won't have
6 his materials with him. And I think this really focuses in
7 on the problem and the misconception that Mr. Fields and the
8 State has about what we are asking for.

9 It is not simply a matter of whether over
10 time Mr. DeMocker could eventually look at every piece of
11 paper in connection with this case. It is much more than
12 that.

13 The Court has heard days and days of
14 testimony in this case. The Court has heard, for example,
15 from Mr. Curry, our financial expert in this case. There are
16 tens of thousands of documents related to the financial part
17 of this case.

18 If Mr. DeMocker were going to have any
19 meaningful conferences with Mr. Curry and his staff about
20 this case, Mr. DeMocker would not only have to have access to
21 all of his documents, which would vastly exceed the two-box
22 limit -- which in and of itself is maybe 3500 pages of
23 documents -- Mr. DeMocker would have to have access, for
24 these conferences to make any sense, to all the documents on
25 the end of this conference call or even in a meeting.

1 Because in these meetings, Mr. DeMocker would have to have
2 the ability to pull up documents that he authored, documents
3 that only he knows about, documents about which he possesses
4 more knowledge and more involvement than anyone else in
5 connection with this case -- lawyer, investigator, paralegal,
6 detective, expert. That is just one example of what this
7 means in this case. Mr. DeMocker needs to be able at any
8 time, when he is either evaluating his own discovery on his
9 own, to have access to all of it -- to the universe of
10 discovery.

11 What the State's memorandum fails to
12 address in any serious manner is the fact that much of the
13 discovery and, in fact, all of the discovery after late May
14 of last year, was disclosed electronically in this case. And
15 it contains, in addition to more than 30,000 pages of printed
16 documents, more than 200 CDs and DVDs -- as we've said many
17 times now -- that contain audio files, video files, recorded
18 interviews.

19 The State has disclosed 2700 recorded
20 jail telephone calls, and that is only through the end of
21 August of 2009. It has not provided any transcripts of those
22 2700 calls. We have attempted to undertake to transcribe as
23 many as of those calls that we can, but that process is
24 time-consuming and incredibly expensive, as the Court can
25 imagine, to catch up with this.

We have asked the State to identify which statements on those jail-recorded calls they intend to rely upon. And their response, received yesterday, was all of them. All of them. So, that means that in addition to the defense team having to listen to and transcribe all of those calls, the person involved in every single one of them, Mr. DeMocker, needs to be able to review them.

They have provided absolutely no suggestion to the Court how Mr. DeMocker would listen to all of these calls, how he would look at these videos -- except to say it could all be done over this video-conferencing system. I am hoping that the Court understands the utter improbability of that, and that it would be impossible to do that work using that technology. The alternative, and one suggestion, is this could all be done in person at the jail.

And perhaps I said something that Mr. Fields simply didn't understand. I said that I stopped having contact visits with Mr. DeMocker, because I didn't want to have him strip-searched more than 75 times in this case. That doesn't mean I don't visit Mr. DeMocker, and that doesn't mean that if I needed to, I wouldn't go through a contact visit. Take a look at the jail logs in this case and see how many times we have been to see Mr. DeMocker in person in this case.

But the point is that Mr. DeMocker is an

1 hour from me, he is over two hours from the rest of our team,
2 and he is sometimes thousands of miles away from the rest of
3 the defense team. The cost of bringing all of those people
4 in groups individually, over and over again, to Camp Verde,
5 Arizona, to see Mr. DeMocker for periods of time speaks for
6 itself, but that is what the State is essentially proposing.
7 And they are saying to you, in this brief, that it is our
8 fault, somehow, that we failed in our responsibilities in
9 this case to manage and organize the documents, and to
10 cherry-pick from them those things that we think Mr. DeMocker
11 needs to see. That is, I think, a pretty clear demonstration
12 of their lack of understanding of the defense function and
13 how it works in this case.

14 It is not simply a matter of showing
15 things to Mr. DeMocker or letting him go over. It's a matter
16 of working with this material. This is a complex case, and
17 because it is a complex case, the one person who has been
18 pulled from the mix is the person possessed of more knowledge
19 than everyone else put together about his case, and that's
20 Mr. DeMocker.

21 The sheriff, I think, today, if they are
22 to be believed -- and I say that simply because the sheriff's
23 position has changed so dramatically just in the last couple
24 of weeks about what they will and they won't do -- but if you
25 take this brief as an expression -- an unequivocal expression

1 of what they will do -- has drawn a line in the sand for you,
2 Judge. They have said, basically, you can't tell us what to
3 do in the jail. We have concerns, whether those concerns are
4 legitimate or not, about security, and we will just not do
5 these things. We will not provide Mr. DeMocker a phone. We
6 will not provide Mr. DeMocker a private room to view his
7 discovery. We will not provide him with a computer or access
8 to a computer. He gets, essentially, what the other inmates
9 get and should be grateful for that. And we don't want to
10 give Mr. DeMocker special privileges.

11 We are not asking for special privileges,
12 and I think this Court's prior order demonstrates the Court's
13 understanding of we're not asking for special privileges.
14 The law is very clear.

15 Even the most recent case of Arpaio
16 versus Baca, a 2008 case, makes it clear that when the Court
17 finds that certain things must happen for an incarcerated
18 defendant to have access to his defense materials in a
19 meaningful way, to assist in his own case, to have access to
20 his defense and his defense team, the failure to provide
21 those things creates a Sixth Amendment violation. And the
22 Court has the ability, narrowly tailored, as the State
23 suggests, to craft a remedy in this case.

24 The sheriff seems to think that this is a
25 stare-down that we have created here between this Court and

them about who runs the jail. That is not what this is about. This is about Mr. DeMocker. He seems to be left on the sidelines in that "High Noon" moment that the sheriff wants.

What we are saying is that the Court has already suggested that -- I think in your words, Your Honor, there could be just a binary decision here. That if the Court finds that what we are proposing is necessary and appropriate and reasonable and, most of all, is required under the circumstances, given the late date and everything that has gone before, then the failure or the refusal of the sheriff to do that can simply be remedied by releasing Mr. DeMocker. Remember, we found Mr. DeMocker subject to release a year ago in this case. It has simply been a matter of Mr. DeMocker's inability to post the bond the Court set and our inability to persuade you over time on other circumstances to revisit that and consider modifying his conditions.

But this showdown that the sheriff seems to be inviting in this case really isn't the issue. That if the sheriff can't or won't, then the Court can simply order Mr. DeMocker released on all of the conditions and safeguards that we have told you about for a period of time, be sure Mr. DeMocker will appear for court, and solve this problem.

I would like to speak for just a moment,

1 again, about the things we have suggested that are critical
2 components to what Mr. DeMocker needs to have access to --
3 whether he is sitting in his own living room or whether he is
4 still in Camp Verde jail. Having all these materials on the
5 computer is, we submit, the only way that Mr. DeMocker can
6 use, in any intelligent and meaningful fashion, all of the
7 materials that have been generated in his case, both through
8 disclosure by the State and through our own work in this
9 case.

10 It is impossible, for example, for
11 Mr. DeMocker to function intelligently with those materials,
12 3500 pages at a time, and expect the detention officers to
13 stop what they're doing and to shift boxes out 17 hours a
14 day, as the memorandum suggests. That is simply illogical.
15 But really more importantly, it just demonstrates that there
16 is so much more to Mr. DeMocker's case than the printed
17 materials.

18 A computer that the sheriff's office
19 provides gets us a little bit further towards that goal line
20 but not all the way there. The problem is that all the
21 materials that Mr. DeMocker would have to have access to
22 would have to then be copied onto disks, onto some sort of
23 removable media. And in their memorandum, the jail
24 complains -- probably rightly -- that that would be really
25 burdensome, that they would be librarians, which is the term

1 that I chose the last time we spoke about this. And they say
2 that that would be a drain on them and difficult to do. I
3 think the answer is that they would just stop doing it after
4 a while.

5 More importantly, the computer, to be
6 useful, has to be equipped with certain software. We
7 described for you the software, which I'm sure the Court is
8 familiar -- Word, Word Perfect, Excel. But there is a
9 particular program called "IPRO," that we have utilized
10 throughout this case, that is a very sophisticated document
11 management program that allows us not only to image and
12 search, but also to do OCR searches within these documents.

13 So that rather than taking his time
14 trying to find, somewhere in the 35,000 pages of printed
15 materials or the hundreds of CDs, where a receipt is or a
16 bank statement or a photograph or a police report. Using
17 IPRO, those searches can be done at the speed of a computer.
18 And that is the only way, given the incredible volume in this
19 case, that we can see this discovery being managed.

20 Remember also, that, as we have
21 complained on many occasions, much of what Mr. DeMocker has
22 and most of what he hasn't seen is coming very late in the
23 game, well after your June 22nd, 2009 discovery cutoff.
24 Disclosure was received last week. These are all things
25 that Mr. DeMocker hasn't seen, much less evaluated, much less

1 helped us to understand in this case.

2 Mr. DeMocker needs to be able to listen
3 and to watch audio and video files. There is no substitute
4 for that. The only way we can see that it makes sense is on
5 this same computer.

6 We talked about putting Windows Media
7 Player on the computer to allow access to audio and video
8 files. That is really the only thing that happens. There is
9 no other way we can do that.

10 And the idea that we would somehow play
11 them over the video conferencing in 30-minute bites a couple
12 of times a week -- there are not enough hours in a day -- if
13 the video-conferencing room had 24 hours a day and
14 Mr. DeMocker were the only consumer, there are not enough
15 hours in the day to play them back, as in the jail calls,
16 much less all the other really important recorded interviews
17 with witnesses and police officers and people connected with
18 the case. His own interview -- he has never listened to his
19 own interview by the police in this case, for that reason.

20 Finally, the telephone. And we thought,
21 mistakenly, that this was going to be the problem, until we
22 realized that the sheriff was going to backtrack and say no
23 to all of these things. Their proposal, in short, is that
24 Mr. DeMocker can use the phone like everybody else in the
25 jail, and that he can do that for 17 hours a day.

1 They suggest that some of these other
2 privileges would put Mr. DeMocker at risk. I suggest to you,
3 Your Honor, that if Mr. DeMocker tried to monopolize one of
4 the phones in his dorm for 17 hours a day or four hours at a
5 time or six hours at a time, Mr. DeMocker would be advised by
6 his fellow inmates that that was not acceptable behavior.
7 But more importantly, it is not a private call. It is not a
8 secure call. It is not a place where he can have serious
9 privileged communications.

10 Thus far, in all of his incarceration, I
11 am the only person he can call on an unrecorded line on
12 that -- we talk to each other short bursts. We are
13 interrupted and disconnected after 15 minutes, with a couple
14 of warning prompts as we come down, and Mr. DeMocker has to
15 try and call back. And I think that I told the Court that I
16 think my record may be 30 minutes consecutively with
17 Mr. DeMocker on that phone.

18 But I know, because I can hear on the
19 other end of the phone -- I can hear Mr. DeMocker talking to
20 the other inmates. I can hear him asking the inmates to turn
21 the television down. We can't have any kind of meaningful
22 communication.

23 I mean, the idea that all of us -- that
24 my co-counsel, Mr. Robertson and his staff, and all of our
25 experts and consultants all over the country can use that

1 phone makes no sense to us. It is simply not a substitute
2 for what we were talking about, which was a place where he
3 can go during the day with a computer, with his materials,
4 with a phone, in privacy, with security, so that he can have
5 these conferences. The alternative is to bring everything to
6 him, but even then, he won't have his materials with him to
7 have these conferences.

8 So we see no way, given the way in which
9 the sheriff's office has positioned themselves in this case,
10 that what they are proposing or any close approximation of
11 that would suffice to resolve the Sixth Amendment violation
12 that we think the Court understood and entered orders about
13 last week in this case.

14 These are serious matters. We are
15 three-and-a-half months from trial now. With an incredible
16 push, Mr. DeMocker could get back up to speed and be useful
17 in his own defense. He has that right. He is on trial for
18 his life in this case, Your Honor. There is nothing more
19 serious.

20 And I think that the simple way to
21 resolve this is to say that if the sheriff tells you here
22 today -- which I would ask the Court to do -- if the sheriff
23 tells you today that this is their position and it is not
24 going to shift somehow during argument this morning, again,
25 in some unexpected direction -- if this is in fact their

1 position, and if you order something different, they will not
2 comply, and they will appeal your decision, then I think they
3 have told you that the binary decision that you have talked
4 about becomes the way to resolve this. And releasing
5 Mr. DeMocker, when he is entitled to be released on terms and
6 conditions, is a way to resolve that dispute, protect
7 Mr. DeMocker's rights, and with the assurances and the
8 conditions that we have proposed, guarantee Mr. DeMocker's
9 appearance for court hearings and for the trial in this case,
10 which is looming in this case.

11 I have been surprised and amazed by many
12 things in this case as they have come across my desk, but I
13 just have to tell you, Your Honor, that with regard to the
14 way this has shifted and changed and turned on a dime the
15 last few weeks, this is among the most surprising parts of
16 this case to me.

17 And I understand the sheriff's position
18 in general, that it is his jail, and he is required to do
19 certain things. But surely, the sheriff and the County
20 Attorney understand that it is the Court's obligation -- not
21 just a part of your job, but it is your obligation to make
22 sure that whatever happens inside that jail, the
23 constitutional rights of defendants are not violated in this
24 case.

25 Whether the sheriff is intentionally

1 violating Mr. DeMocker's rights is not the point of the case
2 and nothing we've ever suggested. It is simply the
3 confluence of their rules and regulations as applied to
4 Mr. DeMocker and his unique once-in-a-lifetime set of
5 circumstances with the volume of discovery, the nature of the
6 discovery, the manner of the discovery, the closeness of
7 trial -- all of those things, I think, come together to show
8 that what they are telling you they are willing to do simply
9 isn't enough. Because it is not enough and not even close to
10 being enough, then I think the only reasonable outcome in
11 this case is to release Mr. DeMocker and resolve that problem
12 in that way.

13 The sheriff expressed concern informally
14 and, again, that by treating Mr. DeMocker specially, somehow
15 that it will open the floodgates and every inmate will be
16 lining up and wanting computers and phones and private rooms.
17 The Court knows that is not the case, and I think the County
18 Attorney knows the case, and I'm presuming the sheriff knows
19 that is not the case. This is a unique set of circumstances
20 for one defendant charged with the most serious of all crimes
21 against whom the most serious of all possible punishments is
22 being sought.

23 It is not a case that would have general
24 applicability to someone charged with far less serious
25 offenses in this case. I do not think that is a real

1 concern, but it is part of what is causing the sheriff to
2 take this position and to cause the sheriff to dig his heels
3 in and say this is all we will do and no more, and so be it.

4 Thank you, Your Honor.

5 THE COURT: Mr. Fields, are you responding?

6 MR. FIELDS: I am responding.

7 THE COURT: Go ahead.

8 MR. FIELDS: Well, it's true that phone access
9 is under some restriction in the jail. It is also true that
10 personal visits have some restriction. It is also true that
11 access to records have some restrictions. But they exist.
12 You can access phones. You can have personal visits with
13 your attorneys or experts, and you can review your records.
14 As we've indicated, we've offered some reasonable
15 alternatives to that.

16 What I find interesting here, Judge, is
17 that all of the things that Mr. DeMocker's counsel complains
18 of, every one of those 40 inmates that is there in that same
19 general population faces the same kinds of challenges. Every
20 single one of them. We can find reason why phone access
21 would be better for an inmate, access to their records or
22 their counsel would be better for the inmate. We can find
23 one of those excuses or reasons for every single one of those
24 people. But that is what the Turner case teaches us. It is
25 not the Court's responsibility to go in and make those kinds

1 of ad hoc decisions. It is the responsibility of the sheriff
2 in managing his own jail.

3 The Turner case also teaches us that,
4 yes, there is going to be an impingement on the free flow of
5 information and the free flow of contact. But that is
6 allowed under the Constitution.

7 What Mr. Sears has to show is that there
8 is a serious constitutional violation here. What he is
9 talking about are inconveniences. There is a lot of experts
10 and they have to call in. They can't do it when they would
11 like to. It is inconvenient to go to visit him. It's an
12 hour away. Mr. DeMocker is strip-searched after contact
13 visits. As Mr. Sears indicated, he stopped doing that he
14 because didn't like that fact. That's a matter of
15 convenience. It's not a matter of a constitutional
16 violation.

17 The forms of disclosure also don't give
18 rise to this. It is the job of the defense counsel to make
19 sure that their client is properly informed. We've disclosed
20 paper. We've also disclosed -- the State has disclosed in
21 the form of disks. It is the defense counsel's job to make
22 sure that that information is given to Mr. DeMocker in a way
23 that he can appropriately use it -- not the State's and not
24 the sheriff's.

25 It is not impossible for them to mount

1 their defense. It is difficult, but again, it is difficult
2 for everyone in the jail. Every inmate faces these
3 challenges.

4 And if this Court decides that this case
5 is special, that Mr. DeMocker is somehow special, based on
6 these facts, every one of those inmates -- and it is true,
7 and Mr. Sears can discount it -- but every one of those
8 inmates will make the same argument -- whether it is a small
9 case or a more difficult case. And the sheriff is going to
10 be faced with this issue, and manpower is going to be
11 expended, officers will be at risk, other inmates will be at
12 risk, and Mr. DeMocker himself, if this is granted, will also
13 be at risk.

14 Judge, you put this in the form, when we
15 were here last week, of an evidentiary hearing. I do have
16 Captain Cicero, and I would like to put him on the stand and
17 run through some questions about the safety and security of
18 the jail and what the sheriff's office is willing to do in
19 order to accommodate Mr. DeMocker's need for information and
20 access.

21 THE COURT: You may.

22 MR. FIELDS: Captain Cicero.

23 THE CLERK: Do you solemnly swear upon penalty
24 of perjury the testimony you are about to give will be the
25 truth, the whole truth, and nothing but the truth, so help

1 you God?

2 THE WITNESS: I do.

3 THE COURT: Mr. Fields.

4 JAIME CICERO,

5 called as a witness, having been duly sworn, testified as
6 follows:

7 DIRECT EXAMINATION

8 BY MR. FIELDS:

9 Q. Captain Cicero, would you state your full name and
10 spell your last name for the record, please.

11 A. Jaime Cicero, C-i-c-e-r-o.

12 Q. Captain Cicero, you are a captain for the Yavapai
13 County Sheriff's Office; is that correct?

14 A. Yes, sir.

15 Q. And what duties do you perform as part of your
16 job?

17 A. I'm currently in charge of the Camp Verde
18 detention facility.

19 Q. Are you familiar with the overall policies and
20 operations of the Camp Verde jail?

21 A. Yes.

22 Q. And it's actually your jail? You're in charge of
23 it?

24 A. Operationally, yes, sir.

25 Q. Tell us a little bit about the overall policies

1 and policy objectives as far as safety and security. What do
2 you attempt to accomplish with those policy objectives?

3 A. They are designed to protect the staff, protect
4 the inmates from one another, and protect the inmates from
5 themselves.

6 Q. I assume that weapons in the jail is a serious
7 issue?

8 A. Very serious issue.

9 Q. Okay. What kinds of weapons are you on the
10 lookout for? What kinds of things would you consider a
11 weapon?

12 A. Anything and everything. I mean, they will
13 alter -- we have -- you know, people receive little
14 toothbrushes that we give them. They are very short. It is
15 anything that they can use to make a weapon, they will. We
16 have learned this from experience over the years. So we have
17 to be very careful about what we provide them, and we do
18 regular searches and inspections to ensure that what we do
19 give them has not been altered, you know, from a cutting or
20 slicing-type weapon or something used to strangle someone.

21 Q. So would you characterize these -- the inmates as
22 creative in their --

23 A. Extremely creative. They have generally not a lot
24 to do, but figure out ways to circumvent the rules and figure
25 out ways to create items such as this.

1 Q. Let's kind of focus on the computer. There is a
2 computer at issue here. Mr. DeMocker is asking that he be
3 allowed private access to a computer.

4 In your opinion, could you imagine ways
5 that the computer or components could be fashioned into a
6 weapon?

7 A. Many. From the laptop itself to the components
8 within the laptop, to the disks or the removal of storage or
9 the batteries or the cord that would be provided, if we give
10 a power source. And then the power source itself -- access
11 to an electrical outlet. Unsupervised, again, we are talking
12 about, too, because in this case, it would be for legal
13 purposes, and there wouldn't be an officer standing over his
14 shoulder.

15 Q. Let's kind of shift a little bit to communications
16 within the jail.

17 Are there restrictions to communications
18 within the jail?

19 A. Yes, sir.

20 Q. And describe some of the restrictions that -- on
21 communicating within --

22 A. Communication is power within a correctional
23 setting. We know that there have been cases where, you know,
24 murders have been ordered, drug businesses have been
25 conducted from behind bars. Any number of things. So we try

1 to limit -- witnesses intimidated. We try to limit those
2 possibilities.

3 And we monitor the non-legal phone calls
4 that take place in the jail for that reason. Legal phone
5 calls are a completely different story. One of the biggest
6 problems facing correctional and detention facilities today
7 is cell phones being smuggled in and used for those purposes.

8 Q. Just that point, for a second. Is there cell
9 phone reception in the jail generally?

10 A. Not generally, no. Very spotty because of the
11 construction. The concrete and the steel, it is very, very
12 difficult to get reception, and I don't think back in the
13 inmate areas that you could. I can't even get it in my
14 office.

15 Q. You mentioned that most of the communications are
16 monitored. You are talking about communication between the
17 inmate and the outside world; is that correct?

18 A. Generally, yes.

19 Q. What about communication within the jail itself,
20 between inmates?

21 A. Yes, we try to limit that. In fact, we have
22 particular dorms that will house people that are in
23 protective custody. If we have co-defendants or people who
24 are witnesses against them, we try to separate them and put
25 them in different areas of the jail. Because that is very

1 common. If one inmate has a problem with another inmate,
2 finds out where they are within the jail, they try to get
3 word to that area and have some sort of harm done to them.

4 Q. There's been -- one of the requests is that
5 Mr. DeMocker be given, essentially, a private phone.

6 Is that physically possible within the
7 jail setting at this point?

8 A. To give him a phone? No. To -- to -- we have
9 rooms with phones in them that are not meant for inmates to
10 live in. But again, that would bring up all the issues.

11 Even if -- let's say we trust
12 Mr. DeMocker, and he wasn't going to do anything with this
13 phone that he shouldn't. It would put a tremendous amount of
14 pressure on him from the other inmates, knowing that he had
15 access to this unrestricted phone -- "Hey, call this person.
16 Tell them this. Pass this message along."

17 I mean, it would put him in a terrible
18 position. We are not willing to do that for Mr. DeMocker or
19 anyone else.

20 Q. You are describing a situation where other inmates
21 would attempt to use him to communicate to the outside world?

22 A. Absolutely. Absolutely. Because he had access to
23 something that they did not.

24 Q. Access to something that they did not.

25 Is that something that you generally will

1 try to allow in the jail or will allow in the jail?

2 A. We follow a pretty simple rule: If you can't do
3 it for all of them you, don't do it for one of them.

4 Q. And why is that?

5 A. It's just that if you follow that, it is just one
6 of the simplest ways to keep us out of trouble and putting
7 them in a bad position. Again, protecting the staff,
8 protecting them from each other, and protecting them from
9 themselves.

10 You know, you spoke earlier about opening
11 up that can of worms and Mr. Sears alluded to that, as well.
12 If you do this for someone, now everyone else is going to ask
13 for the same thing. That's real. That's what happens. The
14 defense community talks. And if we did it for Mr. DeMocker,
15 we can surely do it for someone else. But their safety and
16 security is our primary concern.

17 Q. What would happen if Mr. DeMocker was given an
18 unrestricted line and an inmate asked him to use the line and
19 he refused? Would that possibly create a problem for
20 Mr. DeMocker?

21 A. Absolutely. It would put him in danger.

22 Q. Why is that?

23 A. Would they make good on their threats? They have
24 no reason not to.

25 Q. What kinds of threats would you be --

1 A. Physical harm.

2 Q. To Mr. DeMocker?

3 A. Absolutely.

4 Q. For his refusal to use this line?

5 A. Sure.

6 Q. Okay.

7 A. And I found it interesting that we were talking
8 about phone access, and I was unaware of this, but Mr. Sears
9 himself just said he's made over 2700 phone calls. I didn't
10 know that. But it doesn't sound like he is having difficulty
11 using the phone.

12 Q. Let's talk about what kinds of things that the
13 sheriff's office, at this point, is -- are willing to do to
14 provide Mr. DeMocker with material and communication.

15 A. Yes, sir.

16 Q. Let's start with his current housing.

17 He is housed in general population right
18 now?

19 A. He is, sir. That is actually a deviation from
20 what he should be classified as.

21 Q. Why was there a deviation?

22 A. One of the major factors in classification is
23 current charges. And based on the current charges, you know,
24 he should be classified at a higher level than he is
25 currently with a different class of inmates who tend to be

1 more violent.

2 I think that Mr. DeMocker would deny
3 this, but we had some information -- we know that his family
4 was placing money on books of other inmates -- inmates' own
5 accounts within the jail --

6 Q. Before you answer that question -- so at one
7 point, he was in a higher classification?

8 A. He was in a higher classification, yes.

9 Q. Okay. And this is what was happening --

10 A. And there were some issues that led us to believe
11 that his safety might be in danger. So, again, our primary
12 focus is to keep him safe. So we were going to move him to
13 protective custody.

14 In protective custody, he would have been
15 locked down 23 hours a day. Well, that didn't work for
16 Mr. Sears, because he wouldn't have had enough access to a
17 phone. So we made a concession, and we reclassified him to
18 the general population, so he would have regular access to
19 the phone.

20 Q. Have there been any problems -- safety and
21 security problems, at this point, with the general
22 population?

23 A. Not this far that I am aware of. It has worked
24 out.

25 Q. Okay. He is currently housed in a cell with

1 another person; is that correct?

2 A. I believe so. I don't know his exact, yes.

3 Q. But that would be normal?

4 A. Yes.

5 Q. To double bunk in a cell?

6 A. Sure.

7 Q. The sheriff's office is willing, at this point, to
8 go ahead and give him a single cell; is that correct?

9 A. Certainly. To keep his legal material, yes.

10 Q. And you heard Mr. Sears mention it and you read
11 the brief that the State prepared. The brief indicates that
12 the sheriff's office would be willing to supply him with
13 approximately two file boxes at a time in his cell?

14 A. Yes, sir. To be honest, we could do more, but if
15 we put him in a situation -- if we had more, then it would
16 become a security issue, and we would have to have him in a
17 situation where he was locked down 23 hours a day. We know
18 that that is not going to be acceptable to the defense.

19 So what we've discussed and stated now is
20 that we will give him two file boxes of documents at a time.
21 We can take them all in at the same time -- look through them
22 and make sure there's no contraband present. We don't read
23 it. We just make sure there's not hand grenades or anything
24 like that concealed --

25 Q. That is when they initially enter the secure area?

1 A. Correct. And then we can put them in our property
2 room and provide them to Mr. DeMocker as needed.

3 Q. And then two in his cell, and then another dozen
4 in a storage area?

5 A. Yes, sir.

6 Q. So he would have fairly good access to
7 approximately 14 file boxes at a time?

8 A. Yes, sir.

9 Q. And the sheriff's office is going to do that at
10 this time?

11 A. Yes, sir. As I said, if we take it all in at one
12 time and search it, make sure that there's no contraband in
13 it, then it's not that difficult for us to manage from that
14 point. It is just taking a box to or from.

15 Q. Okay. Let's talk about the telephone, at this
16 point.

17 What are the regular telephone rules?
18 What are standard operating rules regarding telephones in the
19 jail?

20 A. As far as hours of access?

21 Q. Let's start with hours of access.

22 A. Shortly after they eat breakfast in the morning,
23 between 7:00 and 8:00 -- the only time this will deviate is
24 due to transportation -- the phones will come on, and they
25 will be on throughout the day until we lock down, where all

1 the inmates are locked in their cells and we do head counts
2 for the evening, which is about ten o'clock at night.

3 Q. So you said 7:00 or 8:00. Is it maybe earlier or
4 later? What time do they come on?

5 A. Generally, I believe it is 7:00, unless we have
6 got transportation going on. Because you don't want inmates
7 getting on the phones to their families and say "Hey, they
8 just took this particular inmate out to" --

9 (Telephonic interruption.)

10 BY MR. FIELDS:

11 Q. So you were describing the phones, what time the
12 phones come on and exceptions to that.

13 A. Yeah. Transportation would be the only exception.
14 I mean, even through our lockdown hours, to where we don't
15 allow visits or legal visits, where we are doing formal head
16 counts, which are federally mandated, the phones are still
17 on. So they could even talk on the phone or very quickly hop
18 on the phone. There is no restrictions during those times.

19 Q. Exceptions for transportation are talking about
20 when you're gathering inmates to transport to places?

21 A. To the Department of Corrections, right.

22 Q. And how often does that happen? How often do
23 those exceptions happen, and how long do they generally last?

24 A. Maybe a couple of times a week for an hour or two.

25 Q. So essentially, the phone is 7:00 a.m. to -- what

1 time do they shut off?

2 A. Ten o'clock at night.

3 Q. Ten o'clock at night, with a couple of times a
4 week you maybe get an hour or two exception; correct?

5 A. Correct.

6 Q. So that's the access?

7 A. Yes.

8 Q. There has been comments about 15 minutes at a
9 time. Could you tell us about that.

10 A. That is true. To allow fair and equal access to
11 the phones, the phone calls do cutoff after 15 minutes, and
12 you have to recall -- redial.

13 Q. Are there safety and security issues that arise
14 because inmates want the phone or somebody is overutilizing
15 the phone?

16 A. There could be, but with three phones in there
17 with that amount of people, I don't see a lot of, you know,
18 fighting or arguing over the phones. There seems to be
19 reasonable access to the phones. I haven't heard it as a
20 concern before that people couldn't get to the phone.

21 Q. Okay. The -- one of the -- one of the other ways
22 that people can access information is through visits;
23 correct?

24 A. Yes, sir.

25 Q. Tell us about visitation policies.

1 A. Regular or legal visits?

2 Q. Let's go ahead and go straight to legal visits.

3 A. Well, I can tell you that for a period of time,
4 Mr. Sears was coming in on a weekly basis and having contact
5 visits with Mr. DeMocker on a very regular basis, and these
6 were contact visits. And I know that we had had discussions
7 back then, because there were a couple of times that other
8 attorneys had the room or wanted the room, and we had to work
9 around that. We have actually since created some additional
10 space to accomplish these kinds of visits.

11 But outside of the lockdown, from ten
12 o'clock at night until 6:00 in the morning, you have a lunch
13 period of an hour and a dinner period of an hour -- from
14 11:00 to 12:00 and 4:00 to 5:00 -- that are in lockdown.
15 Other than that, those visits are available to any attorney.

16 Q. So you are saying that visits are available from
17 6:00 a.m. to 10:00 p.m.?

18 A. Essentially, with those couple of breaks for
19 lockdown, yes.

20 Q. So an hour break for lunch, an hour break for
21 dinner.

22 A. Yes, sir.

23 Q. And what do you do during that time? Why do you
24 lock down?

25 A. We have no movement, or as little as we can. And

1 we want all of the inmates back in their cells so we can do
2 formal head counts -- name to face, make sure that everyone
3 who is is present -- who is supposed to be present is
4 present, make sure everyone is healthy, and then we go about
5 our business. And we are mandated to do that a minimum of
6 three times a day.

7 Q. So the attorney visits can take place from
8 6:00 a.m. to 10:00 p.m.?

9 A. Yes, sir.

10 Q. With the exceptions of those two hours during the
11 day?

12 A. Yes, sir.

13 Q. The attorney visits, they can be a contact
14 visit -- actually person to person?

15 A. Yes, sir.

16 Q. Or they can be separated by a partition, either
17 way?

18 A. Correct. Obviously, it is easier for us -- we
19 have more availability of the separated. But the contact
20 visits -- the express purpose for the contact visits is
21 generally when attorneys want to bring in the video or audio
22 to review with their clients. And that is what it is for.
23 And you will have multiple people coming in to do that. And
24 sit them in the room, and the attorneys can bring in a
25 laptop. So they are supervised the whole time with them and

1 their clients in the room together, and they do what they
2 have to do. We walk away and leave them to their business.

3 But the equipment never breeches the
4 secure perimeter of the jail.

5 Q. What you just said is what the sheriff is
6 concerned about, about providing Mr. DeMocker with his own
7 computer; is that correct?

8 A. Yes.

9 Q. After the contact visit, an inmate would be
10 strip-searched; is that correct?

11 A. Standard procedure.

12 Q. And why is that?

13 A. You never know how contraband -- you would be
14 amazed at what we've found in the jail, and you never know
15 how contraband gets in. We don't allow contact visit --
16 public visitation for that reason.

17 So anytime that they leave the facility
18 or they have contact with anyone from the outside for any
19 reason, they are searched.

20 Q. So, in essence, you trust the attorneys more than
21 the general public?

22 A. We have some pretty blanket rules that we don't
23 trust anybody. It is not for us to decide who we do and do
24 not trust. It's a blanket policy. Anytime that there's an
25 exposure to the outside -- we recently arrested five people

1 in a plot right here in this courthouse, to stash things, you
2 know, items of contraband in the elevator. And we caught
3 them, and they did. You know, other inmates provided
4 information, because they knew it was happening. We followed
5 up on it and caught them. This type of stuff goes on.

6 Anytime they come out of that secured
7 perimeter, there's a risk. Not to say whose fault it is or
8 who's going to do something wrong. There is that risk. And
9 we just have that blanket policy.

10 MR. FIELDS: May I have the Court's indulgence
11 for a moment?

12 THE COURT: You may.

13 MR. FIELDS: Your Honor, I have no other
14 questions.

15 THE COURT: Mr. Sears?

16 MR. SEARS: May I have just a moment, Your
17 Honor?

18 THE COURT: You may.

19 CROSS-EXAMINATION

20 BY MR. SEARS:

21 Q. Captain?

22 A. Yes, sir.

23 Q. Do you have any particular familiarity with the
24 discovery in Mr. DeMocker's case, beyond what you might have
25 heard in this courtroom?

1 A. No, sir.

2 Q. Can you think of any other inmates that are in the
3 Camp Verde jail now that have the volume and kind of
4 discovery that we have been talking about in Mr. DeMocker's
5 case?

6 A. I am really unaware of -- even with Mr. DeMocker,
7 that is not my role in the criminal justice system, the
8 innocence and guilt part. I just make sure that we treat
9 them fairly and equally. So I don't know.

10 Q. If I understand what you're saying -- first, I
11 assume you are speaking for the sheriff here today; is that
12 right?

13 A. Yes, sir.

14 Q. It is the sheriff's position here today that
15 Mr. DeMocker will not be allowed access to a computer,
16 whether it is the sheriff's computer or a computer given to
17 Mr. DeMocker by us. Is that the sheriff's position?

18 A. Yes, sir.

19 Q. Is it the sheriff's position that if the Court
20 orders that, as it did on January 13th, the sheriff will not
21 comply, will take an appeal?

22 MR. FIELDS: I'll object to that. I think he
23 is asking for essentially something that is privileged
24 between the attorney-client, at this point.

25 THE COURT: Rephrase, Mr. Sears.

1 MR. SEARS: Thank you.

2 Q. Will the sheriff comply with the Judge's order
3 that Mr. DeMocker be provided a computer, if the Judge does
4 not reconsider that order?

5 A. If we are asked to do something that violates our
6 policies and procedures and breaks from the standard practice
7 that we offer every other inmate in the jail, yes.

8 Q. Let me suggest, Captain, that there is a
9 difference between being asked to do something and being
10 ordered by the Yavapai County Superior Court to do something.
11 Do you see the difference?

12 A. My understanding is if there is constitutional
13 violation, which I am not aware of in this case, that that is
14 possible.

15 Q. What is possible?

16 A. That the Court can order us to do something.

17 Q. And if the Court orders you to do it, would you do
18 it?

19 A. I believe if they establish that there was a
20 constitutional violation, we would have no choice.

21 Q. Now, we have talked about it today, and I've heard
22 you testify about a way to manage the paper portion of
23 Mr. DeMocker's case materials; correct?

24 A. Yes, sir.

25 Q. And what you are saying now is that he can have

1 two boxes of documents in his cell at any one time; is that
2 right?

3 A. Yes.

4 Q. If he were moved to a single cell, where would
5 that be located within the jail?

6 A. We would have to lock him down in one of the other
7 dorms, and that door would never be opened while any other
8 inmates are out.

9 Q. So he would be locked down, again?

10 A. Correct.

11 Q. And I think you might be right in assuming that we
12 would have some objections to that. Those were his original
13 conditions.

14 A. Based on our previous experience, yes.

15 Q. And he would be allowed out. And during his time
16 out, he would have to make all of his telephone calls,
17 personal and legal; correct?

18 A. Correct.

19 Q. But he could have two boxes in his current cell;
20 correct?

21 A. Yes, sir. Thousands of documents at a time.

22 Q. Now, the remaining boxes, you all would allow him
23 to have up to 12 additional boxes, but that would be kept in
24 the property room; is that right?

25 A. Yes, sir.

1 Q. Tell us how Mr. DeMocker would access those
2 documents.

3 A. He would simply put out an inmate request form,
4 stating that he needs to trade out his boxes, he needs
5 additional boxes, and they would bring them to him.

6 Q. And how long would that take?

7 A. Shouldn't take long. I would think that within an
8 hour, barring anything unforeseen, they could get him his new
9 box.

10 Q. How many times a day could he do that?

11 A. Several. I don't know how fast he reads. But I
12 would think that if he had several thousand documents at a
13 time, it wouldn't be that often.

14 Q. And because you told us you don't have any
15 familiarity with this discovery, I assume you wouldn't know
16 whether it would be enough for Mr. DeMocker to simply read
17 through the documents and exchange them for other documents,
18 as opposed to going back and forth between groups of
19 documents; correct? You wouldn't know?

20 A. I wouldn't, but it would be -- like I said, the
21 officers are there. They are in the unit. They couldn't do
22 it 60 times a day, but yeah, if they had to do it several
23 times a day, if he needed to see something, we could switch
24 out a box.

25 Q. Having documents relating to your case in your

1 cell can be a security problem, can't it?

2 A. If other inmates had access to it, I suppose.

3 Q. Which could happen; correct?

4 A. In this case, though, I don't think so. If it was
5 a child molestation case or something like that, yes.

6 Q. You are aware, aren't you, that other inmates have
7 come forward and claimed to have information about
8 Mr. DeMocker's case that they want to trade; correct?

9 A. No, sir. You saying that this morning was the
10 first time I heard that.

11 Q. Well, let's just assume, hypothetically, that that
12 happened in the case. One of the ways in which another
13 inmate could possibly gain information about another inmate's
14 case is to look at their paperwork. That happens, doesn't
15 it?

16 A. That would be one of the reasons we put him in a
17 cell by himself. And if he would go out to court, we could
18 lock that cell.

19 Q. Put him in a cell by himself, you could lock it
20 down 23 hours a day?

21 A. No, no, no. When he was outside of the cell.

22 In other words, when Mr. DeMocker was
23 present in the dorm, leave the cell door open, as he normally
24 does each day. If he was going to leave to go to court, for
25 instance -- to address your concern -- we could lock that

1 cell door so that other inmates couldn't, in his absence, go
2 and look through his papers.

3 Q. Including his cell mates?

4 A. He wouldn't have a cell mate. He would have other
5 people in the dorm.

6 Q. So you have single cells that are not in
7 administrative segregation. Is that what you are saying?

8 A. Well, essentially, there would be two bunks in
9 Mr. DeMocker's cell, but he would be the only resident.

10 Q. A special privilege?

11 A. Another special privilege. Yes, sir.

12 Q. You heard me describe this morning what my
13 understanding was of the phone situations in the dorm that
14 Mr. DeMocker is currently housed in; correct?

15 A. Yes, sir.

16 Q. Do you have any problems with my description of
17 where the phones are and how they are used?

18 A. No. I believe, though, that this is --

19 Q. You said that your basic premise was that if you
20 can't do something for all of the inmates, you are not going
21 to do it for an individual inmate; correct?

22 A. Yes, sir. Generally speaking, yes, sir.

23 MR. SEARS: No questions.

24 THE COURT: Redirect?

25 MR. FIELDS: Thank you.

REDIRECT EXAMINATION

BY MR. FIELDS:

Q. Captain Cicero, just so that we are clear, what the sheriff's office is offering, at this point, is that Mr. DeMocker would be in general population, as he is now --

A. Yes, sir.

Q. -- but that he would be given a cell that normally two people would be in, but he would be allowed to be in there alone; is that correct?

A. Yes, sir.

Q. And in that cell, he would be given -- he would be allowed to have up to two boxes of files -- two file boxes?

A. Yes.

Q. And the cell could be closed when he is not there?

A. That's correct.

Q. To make sure that the boxes are secured?

A. That's correct.

Q. The alternative is he could have more boxes, but he would be in administrative segregation, a single cell, with limited ability to get in and out; is that correct?

A. Yes, sir.

Q. And the basis for that distinction is?

A. It becomes a security issue when you have multiple, multiple boxes -- file boxes. It obstructs views, it's used to start fires. There's a number of things. It

1 just makes it more manageable for us. And what we are trying
2 to do is find an alternative means that is the least
3 restrictive on both Mr. DeMocker and the jail.

4 Q. More boxes would be allowed in the administrative
5 segregation because there is heavier monitoring, more
6 security?

7 A. Right. That door wouldn't be open when any other
8 inmate was out. What we are saying here is Mr. DeMocker
9 would have the freedom to go in and out of his cell, and it
10 wouldn't negatively impact his quality of life, as it is now,
11 with the two boxes. If we have a dozen boxes, the cell is
12 just filled with boxes, we are going to have to lock that
13 cell down at that point.

14 Q. Is Mr. DeMocker the only inmate that faces the
15 challenge of managing records?

16 A. I would think not. I'm sure there are other
17 complex cases. I know we have had capital cases in the past,
18 and some of these arguments -- this is the first time I've
19 ever heard some of these types of arguments being made.

20 Q. Have there been other inmates that have had
21 multiple file boxes and had to move them --

22 A. Generally, only pro per inmates, inmates
23 representing themselves, and we have to make similar
24 accommodations for them.

25 But with a legal team of this size, I

1 have never seen this type of --

2 Q. So the accommodations here have been made before?

3 A. The ones that we are offering now, yes.

4 Q. But for inmates that were proper?

5 A. Yes, sir.

6 MR. FIELDS: I have no other questions.

7 THE COURT: Captain Cicero, who do you report
8 to?

9 THE WITNESS: Commander Russell.

10 THE COURT: John Russell is the commander for
11 the detention aspect of the sheriff's office?

12 THE WITNESS: Yes, Your Honor.

13 THE COURT: Did you participate in a previous
14 decision to offer Mr. DeMocker use of a County cell phone --
15 or County computer? Excuse me.

16 THE WITNESS: There was a discussion
17 referencing a County laptop. Yes, sir.

18 THE COURT: A County laptop?

19 And was there a decision made by you or
20 Commander Russell to make such an offer to the defense in
21 this case?

22 THE WITNESS: We had discussed it with
23 Mr. Butner, and we thought it was something that we could
24 entertain. The sheriff objects to that, though.

25 THE COURT: Is it correct that you or

1 Commander Russell, when you indicated to Mr. Butner that
2 Mr. DeMocker could have a County-issued computer, had not
3 discussed that with the sheriff?

4 THE WITNESS: That is true.

5 THE COURT: So when Mr. Butner made that
6 representation to me on January 12, that the sheriff's office
7 was willing to do this, to provide a computer -- a Yavapai
8 County computer, not Mr. Sears' computer -- that is something
9 that was not pre-approved by the sheriff?

10 THE WITNESS: That's correct, Your Honor.

11 THE COURT: And was it within your prerogative
12 as the jail commander or as the jail captain or Commander
13 Russell's prerogative as a jail commander to authorize that?

14 THE WITNESS: The ultimate decision rests with
15 the sheriff. We were trying to find ways to cooperate with
16 the defense, Your Honor. And when the order came out and it
17 differed from anything that we had discussed, we were as
18 shocked as the defense claims to be.

19 THE COURT: Then it went to the sheriff at
20 that point?

21 THE WITNESS: It came to the sheriff's
22 attention at that point, and he said no, we are not going to
23 do this.

24 THE COURT: So you being in charge of
25 security, Commander Russell being in charge of security,



THE COURT: And so your staff is able to

1 maintain some degree of --

2 THE WITNESS: If they poke their heads in and
3 take a look at them and make sure everything is okay, yes,
4 sir.

5 THE COURT: Are these rooms where the
6 attorneys meet monitored visually, through a camera?

7 THE WITNESS: I believe there are cameras.
8 Yes, sir.

9 THE COURT: And are they recorded, so that if
10 somebody did transfer a shank, a shiv, something dangerous,
11 that that could be played back and you could see them?

12 THE WITNESS: Yes, sir. If we discovered it
13 in time.

14 THE COURT: "In time," meaning that the
15 video --

16 THE WITNESS: The video will overwrite.

17 THE COURT: -- or recorded over. Okay.

18 When it was discussed as a possibility to
19 allow a separate room, where was that going to be physically
20 within the jail system?

21 THE WITNESS: We really hadn't figured that
22 all out. We had discussed an area in the infirmary. We had
23 discussed putting him in a visitation booth. Again, it's
24 unprecedented. We have never done anything like this before.
25 So we are trying to figure out if there was something we

1 could do without sacrificing safety and security.

2 THE COURT: And had it been done, it would
3 still amount to much of the same thing as when somebody has a
4 contact visit. In other words, you would have to do an
5 intimate search of the inmate --

6 THE WITNESS: Yes, sir.

7 THE COURT: -- when he comes back into general
8 population and might mix with other people?

9 THE WITNESS: That's correct, Your Honor.

10 THE COURT: So is it your impression that as
11 of January 12, when it was represented to me that this could
12 be done essentially immediately, absent any quote, is it your
13 impression that that decision had been finalized, or was
14 there still a lot up in the air about exactly where to do it,
15 how to do it, and that sort of thing?

16 THE WITNESS: Correct. The way we would have
17 carried it out, had we gone through, it was still up in the
18 air. We hadn't worked out all the bugs.

19 THE COURT: Is it your understanding, from
20 what we've discussed this morning, that when we are talking
21 about the 2700 calls, we are talking about calls that are the
22 taped lines, not on the attorney-client lines?

23 THE WITNESS: Yes, Your Honor.

24 THE COURT: And the attorney-client lines, you
25 all don't tape?

1 THE WITNESS: That's correct.

2 THE COURT: Follow-up questions to mine,
3 Mr. Fields?

4 MR. FIELDS: Just a couple, Your Honor. Thank
5 you.

6 FOLLOW-UP QUESTIONS

7 BY MR. FIELDS:

8 Q. How would you characterize the importance of a
9 routine and procedures in a jail?

10 A. Extreme. Again, like if you can't do it for all,
11 you don't do it. We follow a regimen. It maintains order.
12 And by maintaining that order, you don't put yourself at
13 risk.

14 If we are doing one thing in this case
15 and we're doing a different thing in this case, people can't
16 keep up. What are we supposed to be doing now?

17 If we do the same thing the same way all
18 the time, it keeps everybody safe. Keeps everybody alive.

19 Q. The attorney visits, the contact visits, are there
20 policies and routines with regard to that?

21 A. Yes.

22 Q. The attorneys show up and --

23 A. There are attorney booths that we let them have
24 use of. We generally request that if they are going to want
25 contact visits, that they arrange for the rooms that we have

1 the ability to do that in.

2 Q. During the contact visits, are there searches of
3 the attorneys and their equipment?

4 A. Not generally. We have the right to, but we don't
5 generally do that with the attorneys.

6 Q. But you could?

7 A. We could.

8 Q. Do you search the inmates?

9 A. We do it on that side of it, yes, sir.

10 Q. And that happens every time?

11 A. Yes, sir.

12 Q. And there is a standard policy to do that?

13 A. Yes, sir.

14 Q. What Mr. DeMocker is asking for, this private room
15 and these contacts, is that a routine? Do you have policies
16 for that?

17 A. It is not a routine. It is out of -- no, sir. It
18 is not a routine.

19 Q. So it would be disruptive and out of routine?

20 A. It absolutely would be.

21 Q. Would that create a potential security risk for
22 you?

23 A. Yes.

24 MR. FIELDS: I have no other questions.

25 THE COURT: Mr. Sears?

1 MR. SEARS: Thank you.

2 FOLLOW-UP QUESTIONS

3 BY MR. SEARS:

4 Q. Captain, the judge was asking you some questions
5 about the difference between monitored phone calls and
6 attorney-client phone calls.

7 All of those phone calls for Mr. DeMocker
8 are made on the same set of telephones. There is not a
9 separate phone that he would be taken to to make
10 attorney-client phone calls?

11 A. That's correct.

12 Q. The difference is within the system, the
13 computerized system that runs the things, a box saying
14 monitor simply not checked with regard to certain phone
15 numbers.

16 A. Right. It recognizes your phone number, and it
17 knows not to record.

18 Q. Right. But he is making the same phone call to me
19 from the same phone, with the other inmates around and the
20 television there, no desk, no table, no chairs, but the
21 telephone; correct?

22 A. As every other inmate does, yes.

23 Q. Every other inmate does, right. But he doesn't
24 have access -- doesn't have a place where he can even spread
25 out his two pages -- two boxes of documents and sit and talk

1 on the phone.

2 A. We don't have an office available for him, sir.

3 Q. Right. Okay. Now, the rooms that you were
4 exploring -- and you are talking about the attorney booths --
5 I am reasonably sure Judge Lindberg has not visited with
6 clients in the new jail.

7 When you go into the jail, you go
8 upstairs to the second floor. There are a row of public
9 visitation booths on either side of a long hall; correct?

10 A. Yes, sir.

11 Q. Those are simply Plexiglas and a phone on either
12 side and a stool. There are no doors on either side;
13 correct?

14 A. Yes, sir.

15 Q. And in the center of this long row there are
16 attorney-client visitation booths; correct?

17 A. That's correct.

18 Q. There are a number of them that are essentially
19 the same setup as the public visitation, except that there
20 are doors on both sides. There is a door on the attorney's
21 side and a door on the client's side; correct?

22 A. Yes, sir.

23 Q. And you speak over a telephone; correct?

24 A. Yes, sir.

25 Q. And there is no slot to pass documents through;

1 correct?

2 A. In some of them, yes, sir.

3 Q. Okay. And then there are a couple of rooms in the
4 center which are basically those attorney-client booths with
5 a Plexiglas divider, so that the attorney and client are in
6 the room together; correct?

7 A. Correct.

8 Q. Current policy is that one of the inmate's hands
9 has to be handcuffed to the table; correct?

10 A. Yes, sir.

11 Q. Is that the room you are talking about where
12 attorneys are putting laptops in to work with their clients?

13 A. As of late, we have been using what we refer to as
14 the CSI room, which is the room, I believe you referred to
15 earlier, to the side of the courtroom.

16 Q. On the first floor?

17 A. Yes, sir.

18 Q. That room has to be booked in advance; correct?

19 A. Yes, sir.

20 Q. That room is also used for a number of other
21 things, correct, other than attorney visits?

22 A. Other than attorney visits, I think probation
23 officers would use it sporadically.

24 Q. If I told you that I had a psychologist that was
25 booked to use that room all day this coming Monday, that

1 would be another example; correct?

2 A. Yes.

3 Q. So that room is not available to Mr. DeMocker
4 eight hours a day, seven days a week to meet with anybody, is
5 it?

6 A. Not that -- no, we couldn't tie up the room full
7 time, but we could make other arrangements. If we needed to
8 use one of the program rooms, in certain circumstances, if
9 the CSI room wasn't available, we could arrange for that.
10 And there is the video that you spoke of earlier --

11 Q. The video conference?

12 A. Which is now available on the units.

13 Q. Now, on the inmate side of that, the inmate is put
14 in a very small room, not much bigger than your average coat
15 closet; correct?

16 A. Correct. A little bit bigger.

17 Q. And he would not have access to his papers in that
18 room. He wouldn't be allowed to bring those down, would he?

19 A. They could be brought with him, yes.

20 Q. Really?

21 A. Yes, sir.

22 Q. Mr. DeMocker is not allowed to bring his paperwork
23 when he comes to court, is he?

24 A. He's leaving the facilities.

25 Q. He is told to leave it there; correct? He is not

1 allowed to bring it; correct?

2 A. Correct.

3 Q. So every time he comes here to Prescott, he is not
4 allowed to bring any of his papers with him; is he?

5 A. Correct.

6 Q. Other than the possibility of attorneys or members
7 of his defense team playing -- coming up to the Camp Verde
8 jail and playing audio and videotapes on a laptop for
9 Mr. DeMocker in a face-to-face meeting, the jail has no other
10 way to provide Mr. DeMocker access on his own to recorded
11 materials; is that correct?

12 A. Via the video, it could be done, too, I believe.
13 You know, if you were to get the setup in your office, you
14 could play this audio -- book one of the video rooms -- and
15 we have five of them -- for a couple-hour block of time, and
16 sit there and play some of this audio for Mr. DeMocker. That
17 would be fine.

18 Q. He would be sitting in the booth, and you would
19 have to play it on your end --

20 A. Right.

21 Q. Okay. Okay. So do you know if anybody has ever
22 done that, ever played audio or video over the video
23 conference --

24 A. They are privileged, so I actually don't know.

25 Q. Do you have any idea of the sound quality? Have

1 you ever used the video conference room?

2 A. I have gone in there and tested it out. It's
3 pretty good. It's like you are on the phone, and if you had
4 him on speaker phone on the other side, I think you could --

5 MR. SEARS: Okay. Thank you.

6 I have no other questions, now. Thank
7 you very much.

8 THE COURT: Mr. Fields.

9 MR. FIELDS: I think we are okay.

10 THE COURT: Any further questions?

11 MR. FIELDS: No.

12 THE COURT: You may step down.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: I would like to take a break for
15 staff. About ten minutes.

16 (Brief recess.)

17 THE COURT: The record continues to reflect
18 the presence of Mr. DeMocker, his attorneys, Mr. Fields.

19 Mr. Fields.

20 MR. FIELDS: Your Honor, to kind of sum up
21 here, basically, jail is inconvenient. And every one of
22 those inmates over there faces that problem -- faces the same
23 problems that Mr. DeMocker is facing. They are complicated
24 cases, they are capital cases, and all of those inmates are
25 facing the same kinds of issues.

1 The question here is, is there a
2 constitutional violation? The answer is no. It's a
3 difficult case. No doubt. And it takes a lot for
4 Mr. DeMocker and his defense team to prepare. They've got a
5 large defense team.

6 The jail is more than willing to offer
7 the accommodations here. Mr. DeMocker has the ability to
8 contact by phone, personal contacts, arrangements can be
9 made. His defense team can make arrangements to play audio
10 for him. They can transcribe. There's ways to get the
11 information to Mr. DeMocker, have him analyze it, and have an
12 effective defense. There is simply not a constitutional
13 violation here.

14 The complexity of the case, if it is
15 difficult for them, I have no doubt it is. Their option here
16 is to ask for a continuance. They need more time. It's
17 pretty clear from their arguments they need more time anyway.
18 The State is not going to move for a continuance, but I don't
19 think we would necessarily oppose that either. But that's
20 their alternative, here. That's their alternative.

21 You have found that this man is a danger
22 to the community and that there is a flight risk here. You
23 found that over a year ago. Nothing has changed. The fact
24 that they have a complex case does not change those facts.

25 The Court has the ability to alter

1 release conditions, that is true. But again, we point out
2 nothing has changed. Nothing has changed on the safety of
3 the community and the flight risk. And we still oppose
4 modification of the release conditions, and I thank you.

5 THE COURT: Mr. Sears.

6 MR. SEARS: I am thinking, based on what
7 Mr. Fields has said informally and here in court this morning
8 and what he has written, that perhaps the sheriff's office
9 and County Attorney are not understanding the constitutional
10 issues in this case. They seem to think that we are
11 suggesting that they are running an unconstitutional jail,
12 and that their inability to provide the accommodations for
13 Mr. DeMocker makes the jail unconstitutional. It's not true.

14 What we are saying, Your Honor, is that
15 given the specific circumstances of Mr. DeMocker's case,
16 about which we have talked at great length again today, and
17 matching those up against what the jail is willing or not
18 willing to do by way of accommodation, we think that you have
19 already come down on the side that certain basic elements of
20 what we have proposed are necessary to give Mr. DeMocker his
21 own individual Sixth Amendment right to access to his own
22 materials.

23 We have provided you with case law going
24 back to Smith and Bounds from back in 1977, a United States
25 Supreme Court case, all the way through and including Arpaio

1 versus Baca, a recent Arizona Supreme Court case, that make
2 it clear that a defendant has the individualized right to
3 participate in his own defense in a meaningful way, and tied
4 up in that is access to materials.

5 We don't question the role of the sheriff
6 in maintaining a secured jail. As a general principle, we
7 don't dispute what Captain Cicero has said here again, that
8 order and discipline and even-handedness are important
9 elements of that.

10 What we do disagree with is whether, as
11 applied to Mr. DeMocker, what the jail is and is not willing
12 to do in his particular case is enough. With all due respect
13 to my colleague Mr. Fields, it's more than just
14 inconvenience, and the Court knows that. Certainly everyone
15 in jail presents an inconvenience to his own defense. We
16 understand that.

17 We have a large defense team. There is a
18 large prosecution team. There are many county attorneys,
19 paralegals, investigators, detectives, experts on the other
20 side. They have given us evidence in this case -- they
21 continue to give us evidence in this case up to the present
22 time in apparent disregard for this Court's orders to stop
23 doing that, to cut off disclosure months ago.

24 The particular problem for Mr. DeMocker
25 in this case is not just the number of pages of printed

1 discovery. That is simply a part of the complexity of this
2 case, and it is an extraordinary amount of paperwork. And I
3 dare say, you will not find another case in Yavapai County,
4 perhaps ever, that has generated this level of paper
5 discovery.

6 But the particular problem is that it is
7 all related. All the discovery in this case is related to
8 the other discovery. It is not a linear project for
9 Mr. DeMocker and his defense team.

10 You have seen and heard much about the
11 elements in this case. Just looking at financial records,
12 bank statements relate to deposition testimony, relate to
13 recorded interviews, relate to credit card statements, relate
14 to grand jury testimony in this case. It is critical, and it
15 is the way we operate, and I am sure it is the way the County
16 Attorney would operate, to understand and get your arms
17 around all of the discovery in this case.

18 The only way it can possibly be done in
19 this case, particularly at this late date, is with the use of
20 a computer. I believe the Court accepted that general
21 principle by signing the order on January 13th.

22 I am disheartened to hear today that when
23 Mr. Butner conferred with Captain Cicero and Commander
24 Russell that whatever it was that he came away with from that
25 discussion to represent to the Court was not the final word,

1 apparently, in the sheriff's office. But again, we don't
2 dispute the fact that the sheriff is where the buck stops on
3 such matters, and we understand that it's the sheriff's
4 responsibility and not his administrative staff to make these
5 decisions.

6 Nonetheless, we see a line being drawn
7 here, over which the sheriff will not go. Delay is
8 unacceptable, Your Honor. Your Honor suggested informally to
9 Mr. Butner that he inquire about the status quo, to see if we
10 could get something done in the last week leading up to
11 today's hearing. I never heard back from Mr. Butner about
12 that. So Mr. DeMocker continues to have access to zero
13 pieces of paper in this case.

14 We lose sight -- when we just talk about
15 the paper discovery and the boxes and the property room and
16 sending out a kite to get access to that, we lose sight of
17 what we have tried to portray as the real nature of the
18 discovery in this case and why it is important. Mr. Fields
19 is wrong in suggesting that we would ask for a continuance
20 because we obviously need more time. You have heard us all
21 stand up here on the defense side, Your Honor, and say time
22 and time again, we will go to trial on May 4th, 2010. We
23 will be ready.

24 It is the State that has been,
25 remarkably, in this case, asking for more time and asking for

1 delay, and dragging their feet in disclosing things. I
2 understand and appreciate that Mr. Fields could not possibly
3 know that, and I do not hold it against him that he made such
4 a suggestion.

5 I do, however, take issue with the
6 suggestion that you found that Mr. DeMocker was a danger to
7 the community. I am not aware of any such finding, and I
8 don't think that you would have made such a finding, because
9 there is no evidence whatsoever to support that in this case.

10 Instead, what we have here is a situation
11 in where the sheriff has said that they think they have
12 concerns which override whatever it is that we suggest and
13 whatever you apparently will order them to do to bring
14 Mr. DeMocker back to a place where his Sixth Amendment rights
15 are no longer being adversely affected or violated.

16 So that everyone understands, we are not
17 saying that the sheriff is knowingly or intentionally
18 violating Mr. DeMocker's Sixth Amendment rights. We are
19 simply saying that Mr. DeMocker has those rights, they belong
20 to him. This Court has the ability and the obligation to
21 protect them when they are called into question. This is the
22 time to do that.

23 Releasing Mr. DeMocker obviates all of
24 these issues. It relieves the sheriff from any perceived
25 pressure to do something for other inmates. It avoids

1 creating a fight over this, which would only delay further
2 Mr. DeMocker's ability to have his Sixth Amendment rights in
3 this case. It removes any question of security risk or
4 special treatment or locking Mr. DeMocker down or any of the
5 other things that have been talked about here today in
6 writing to do this. It's a simple and obvious explanation.
7 There really is nothing else that can be done.

8 Had the sheriff's office been willing to
9 make the specific accommodations that we proposed -- a
10 computer that we provide with all the things on it and
11 operating in the way that we described, a private and secure
12 place to use it all day, every day, with access to a
13 telephone to talk to the people he desperately needs to have
14 contact with, then perhaps the Court could have been moved
15 away from that binary decision. But we're not there. And
16 the sheriff appears determined not to permit that to happen,
17 for whatever reason in this case.

18 And rather than pick a fight with the
19 sheriff and taking it to some other court for determination
20 and further delaying this, we strongly suggest that the Court
21 exercise that option and simply release Mr. DeMocker to do
22 the things that he needs to do in this case.

23 There are many, many things about this
24 case which Mr. Fields and the sheriff's office do not know
25 about, but about which I think the Court knows -- about the

1 complexity of the issues and the interrelationship of the
2 financial issues and the computer searches and the forensic
3 issues and the DNA, and things we haven't talked about at all
4 in connection with this proceduring. But the Court knows
5 about all of those matters.

6 And the suggestion that all of that can
7 be brought to the Camp Verde jail and spoon fed to
8 Mr. DeMocker in small doses, given the amount of time prior
9 to trial, given what needs to be done, in our view, Your
10 Honor, just isn't acceptable.

11 What we have proposed was a set of
12 circumstances that, if agreed to by the sheriff, which we
13 thought there was a chance that he might, then perhaps
14 Mr. DeMocker could have what he needed to do while he was
15 incarcerated. I think that pretty clearly is not the case
16 here.

17 And I would urge the Court to recognize
18 that Mr. DeMocker has Sixth Amendment rights. You don't need
19 to find that the jail is violating those rights. You simply
20 need to find that your prior orders were appropriate. The
21 State has not demonstrated any reason why you should
22 reconsider those orders.

23 What the State is proposing by way of
24 compromise is unacceptable, and therefore, in order to
25 protect Mr. DeMocker's rights, he simply needs to be

1 released.

2 Thank you.

3 THE COURT: Thank you, ladies and gentlemen.

4 I think, first of all, I should recall
5 for the sake of the record, the manner in which this came
6 before the Court. What we are dealing with today is
7 reconsideration of the order that I entered on January 13.
8 I recognize that, despite the fact that I have the chief
9 deputy of the County Attorney's Office present, who has
10 jurisdiction -- supervisory jurisdiction over both the civil
11 and criminal divisions of the office, Mr. Fields is not the
12 assigned prosecutor. The assigned prosecutor is Mr. Butner.
13 Mr. Butner is with the criminal part of the office, and I
14 wouldn't hold Mr. McGrane to intricate knowledge about the
15 facts of the case or the history of the case.

16 Mr. Fields is here representing the
17 sheriff of Yavapai County. And despite the fact that he
18 alluded to certain matters within the criminal case, what we
19 are here for is whether the order that I entered on January
20 13 should be reconsidered or not. The way in which this
21 order came up, however, is related to the criminal case.

22 And it is a fact that on January 12th,
23 what I was considering was modification of the release
24 conditions. It was not the defense, and it was not the
25 Court, as a matter of record, that proposed giving

1 Mr. DeMocker, quote, "special treatment," close quote, within
2 the jail. The manner in which that came up was a proposal
3 from Mr. Butner, having spoken with administrative personnel
4 of the Yavapai County Sheriff.

5 I suspect that to the extent that he may
6 not have had authority or that the sheriff now takes a
7 different position than what his administrative staff took,
8 as represented by Mr. Butner, is a matter of Mr. Butner or
9 the jail commander or the jail captain not clearing with the
10 sheriff what they were willing to do prior to the entry of
11 the court order.

12 The proposal for any change in
13 Mr. DeMocker's conditions vis-a-vis other inmates in the jail
14 was something that came up on January 12th when Mr. Sears had
15 been arguing, much the same way that he argues today, about
16 the problems with the representation and Sixth Amendment
17 rights of Mr. DeMocker, given the conditions at the jail and
18 the amount of information that was there.

19 Mr. Butner, on Page 8 of the partial
20 transcript from January 12, indicated that what he had told
21 Mr. Sears was that the jail could provide Mr. DeMocker with a
22 computer and a place in the jail where he could work on his
23 disclosure, examine all of the materials and so forth, and
24 then also a secured telephone line that he could communicate
25 with counsel and even experts on the same line from time to

1 time. That is what Mr. Butner was telling the Court so the
2 Court could consider that in connection with the motion that
3 was made by Mr. Sears.

4 He went on to state, "When I say 'from
5 time to time,' I think that would be on a regular basis,
6 maybe as often as every day." So clearly, things were not
7 totally nailed down on issues such as password protection for
8 the computer, head phones to listen, external storage
9 devices, and where the private space would be in the jail,
10 and the outlet, and that sort of thing. I don't doubt that
11 it's not just the sheriff, but the captain and the jail
12 commander who are concerned with safety issues and security
13 issues within the jail.

14 Mr. Butner told me, on Page 10,
15 essentially, quote, "The computer is awaiting Mr. DeMocker,
16 so to speak, in the jail. They can take him to a room that
17 has a private plug. He will be alone there to deal with his
18 discovery materials. I have been informed that this can be
19 done eight hours per day, possibly even longer," close quote.

20 So the entry of the order by the Court
21 essentially was in response to that, and perhaps that is
22 where the Court improvidently exercised its issuance of an
23 order to modify what was being offered by the County Attorney
24 as to what could happen in the case, distinguishing that from
25 modification of release conditions. In other words, telling

1 the Court that the modification of release conditions, at
2 least for that reason, would not be necessary.

3 As we know, I did not enter any order
4 with regard to a secured telephone line because I was
5 uncertain as to the existence of the capabilities of the
6 sheriff to provide such a line. So that was left as an open
7 question. For example, I didn't know whether the room was
8 hard-wired or not for having a phone line, and I understood
9 some of the complexities of having the cell phone issued to
10 Mr. DeMocker, particularly in the context of the capabilities
11 of the cell phone to call parties other than his attorney and
12 the security issues that that would raise.

13 So I essentially invited the sheriff's
14 office response, in particular with regard to that issue, but
15 with an understanding that the idea of a computer in a
16 separate room were the ideas of the sheriff's office, not the
17 ideas of the Court or even defense counsel.

18 It appeared to me that given that the --
19 and this is perhaps where I went beyond the legitimate
20 concerns of the judicial branch into the concerns of the
21 executive branch of government -- to substitute what would
22 seem like a reasonable approach to the issues of how to get
23 the materials into the computer that would not require
24 somebody acting as a librarian, baby-sitting the defendant,
25 and demanding more of personnel of the Yavapai County

1 Sheriff's Office by having the capabilities of an external
2 hard drive that could be so loaded, given that the sheriff's
3 office at the echelons lower than the sheriff itself were
4 willing to make such accommodations for Mr. DeMocker. And I
5 think that is where one can get into trouble with separation
6 of powers issues.

7 As everyone is aware, the government is
8 composed of different branches of government -- the executive
9 branch, the judicial branch, and the legislative branch. And
10 clearly, I understand that the Doctrine of Separation of
11 Powers is to allow for independent functioning of each
12 component of the government over those areas of
13 responsibility that they have without the risking of
14 interference or intimidation or control by any of the other
15 branches. And I recognize that it is the sheriff under
16 Arizona law that is given the responsibility, as a member of
17 the executive branch, to take charge of and maintain and keep
18 the County jail and the prisoners, the inmates that are
19 within the County jail.

20 I am not unaware, of course, that inmates
21 in the County jail system are not all convicted felons or
22 misdemeanants. A large proportion of the jail population
23 consists of people who have not been convicted, who are
24 simply awaiting trial, who cannot post the requirements of
25 bail or bond or other requirements pending their trial. And

1 I also recognize that they are presumed by law to be innocent
2 of the charges and have rights pursuant to the Sixth
3 Amendment of the United States Constitution and equivalent
4 provisions of the Arizona Constitution.

5 And so I think I, in issuing the orders
6 which I did, substituted my judgment for what is reasonable
7 from the -- and necessary from what was within the
8 prerogative of the sheriff himself and his administrative
9 officers in the case.

10 And so to that end, I am going to vacate
11 the order that I entered as having been improvidently granted
12 or prematurely granted. But I thought it necessary to
13 indicate for the record that none of this was either
14 Mr. Sears' or the Court's idea.

15 And so to the extent that there are
16 policies and security objectives that are seeking the
17 security of persons within the jail, either the detention
18 staff or the persons who are held in confinement, pretrial or
19 post trial, then I think that order invaded the province of
20 the executive branch.

21 I recognize and support the notion that
22 the primary goal of any jail facility is to ensure the safety
23 of the inmates and the corrections personnel. And I suppose
24 I find it -- I find it a bit odd that the sheriff's office or
25 County computer perhaps would not present the security

1 concerns, and that an outside computer would present those
2 security concerns, but far be it for me to have the sheriff
3 violate the policies that he's implemented for the safety of
4 his personnel, as well as the safety of the people within the
5 jail.

6 So, to the extent that this was a hearing
7 on the request to modify the order or vacate the order that I
8 have entered, I am vacating that order. I do not find that
9 the order which I entered has been demonstrated to be
10 required so as to secure the defendant's Sixth Amendment
11 rights.

12 However, the Court will, therefore,
13 strike the references that Mr. Butner made to having some
14 other resolution of the matter. I won't consider that
15 because, apparently, he lacked the authority to make that
16 suggestion, having not gone fully up the chain of command. I
17 recognize the sheriff's office is a hierarchical regimented
18 sort of operation, has different assignments and ranks within
19 it. And apparently the mistake made was in not finalizing
20 the information and clearing it with the sheriff, who I
21 recognize is a constitutional officer equivalent in the
22 executive branch to make decisions about those matters within
23 his authority as the Court is in the judicial branch and I,
24 as a judge, am as a member of the judicial branch.

25 So the order is vacated, but I am going

1 to reconsider, based on that, whether there should be any
2 modifications of release conditions. That is within my
3 authority. And so I guess I have a concern over the
4 representations made to me by the defense and not wholly
5 disputed by Mr. Butner, the assigned prosecutor, as to
6 representations made of what could happen, would happen,
7 might happen, with regard to access to the materials that the
8 defense believes Mr. DeMocker needs to secure his right to a
9 fair trial.

10 So I am going to take that issue under
11 advisement. I am going to set the matter for a time frame
12 that Mr. Butner can be back with us to address the issues
13 that are pertinent to his handling of the case, since he is
14 not here with us today. So I am going to set a pretrial
15 conference next Friday at 1:30 on January 29th to address the
16 issues that are still pending, in particular the -- whether
17 there needs to be something more said about the materials and
18 whether the system that has been proposed that the sheriff is
19 willing to work with is providing the materials to
20 Mr. DeMocker in a fashion that will allow him to have a fair
21 trial in this case.

22 Mr. McGrane?

23 MR. MCGRANE: Your Honor, I wanted to
24 apologize to the Court. Mr. Butner wanted to be here today,
25 but he had another hearing in the Verde.

1 THE COURT: I knew that. He told me the last
2 time we met that he would not be here because of his other
3 cases that he has.

4 MR. MCGRANE: Thank you.

5 MR. SEARS: Our understanding is that that
6 hearing is with the public defender's office, and our
7 colleague, Mr. Culvertson [phonetic spelling] was handling
8 that matter and advised us last evening that that hearing,
9 this morning, had been vacated, as a result of the weather.
10 So perhaps Mr. Butner is available today, if the Court has
11 the time. We certainly are all here.

12 Could we find out?

13 THE COURT: We can look into that.

14 Mr. Fields.

15 MR. FIELDS: Maybe telephonically. Mr. Butner
16 lives in Verde.

17 THE COURT: I recognize that, and I am sure
18 Mr. Sears knows that. Probably the other counsel do not.

19 MR. SEARS: Mr. Hammond, Ms. Chapman, and
20 Mr. Robertson live in the Phoenix area and are here today.

21 THE COURT: I understand that, too. I didn't
22 believe the roads were as bad today as they were yesterday.

23 I don't have a problem, if -- would you
24 be willing to waive -- and obviously I also recognize that
25 Mr. DeMocker came from Camp Verde, as well.

1 Would you be willing to waive
2 Mr. DeMocker's presence for purposes of further discussion of
3 the motion to compel that you have pending, so that we can
4 address that and allow him to get safely back to the jail
5 facility?

6 MR. SEARS: Your Honor, I'm sure our friends
7 from the sheriff's office can speak to this clearly.

8 Mr. DeMocker thinks that the only person
9 that came with him today from the jail doesn't appear until
10 2:00, and so he would probably be here most of the day
11 anyway, unless there is some other change that I don't know
12 about. I just don't know.

13 THE COURT: Well, I can see. If you want to
14 take a recess, I can see if Mr. Butner is available by
15 telephone and can speak to us, in particular, with regard to
16 the motion to compel. That is the most pressing issue, I
17 think, that I would like to address sooner rather than later.

18 I am not saying that I may not also have
19 a pretrial conference next week on the 29th and look for
20 information about what, if any, changes have been made in the
21 practices of the jail to -- for me to consider with this
22 motion under advisement that I have concerning modification
23 of release conditions.

24 MR. SEARS: We will stand by and wait for
25 whatever information the Court needs.

1 THE COURT: We will try and contact
2 Mr. Butner's office. We will take a recess in the meantime.

3 (Brief recess.)

4 THE COURT: Thank you.

5 We are continuing in the Steven DeMocker
6 case, CR 2008-1339, but in the interim the other members of
7 the County Attorney's office have left. I still have your
8 assistants, Mr. Butner, and Mr. Butner is appearing
9 telephonically now and counsel for the defendant are still
10 present. Mr. DeMocker is still present.

11 I thought I would let you know what I did
12 with regard to the order that was up for reconsideration
13 today, and I have vacated that order to some extent based on
14 separation of powers issues. However, I have still, then,
15 under advisement the motion for modification of release
16 conditions, because the way in which that order came into
17 being was my understanding of what the sheriff was and was
18 not willing to do. Mr. Sears advised me that he has
19 perceived no changes in the former circumstances of
20 Mr. DeMocker's access to his file -- correct me if I am
21 wrong, Mr. Sears -- but the status quo then would be one box
22 of materials at a time within his cell and no access to a
23 separate room or multiple boxes.

24 Mr. Sears.

25 MR. SEARS: Yes, Your Honor. The current

1 status quo is that Mr. DeMocker has access to what amounts to
2 about a third of a box, a plastic tub, and has no documents
3 in his property room. That is a new development raised in
4 Mr. Fields' memo yesterday for the first time. Has no
5 private room, has no secure private telephone access, and all
6 of the other things that the Court knows about. So the
7 status quo is simply he has a relatively small handful of
8 papers connected to his case presently. That is where things
9 stand today.

10 THE COURT: Thank you.

11 To the extent that Captain Cicero
12 testified concerning what the sheriff's office was willing or
13 not willing to do, I guess it remains to be seen that they
14 can make any modifications to the status quo. And so my
15 intention is to set another hearing next week to monitor
16 that and see if there have been any changes and whether I
17 should -- and if there have not, whether I should make
18 modifications to the release conditions that was requested by
19 Mr. Sears previously.

20 So the purpose of my asking for a
21 continuation and have you appear telephonically at this time
22 was to discuss a motion to compel that had been filed by
23 Mr. Sears on January 11 relating to certain items. I did
24 receive State's response, and I did receive a reply from the
25 defense concerning that, and my reason for wanting to take

1 that up in shorter order is because the request that was made
2 was that your side be required to produce those items by
3 January 25th, which I observed is Monday.

4 Mr. Sears, you are rising again.

5 MR. SEARS: I am, Your Honor. I rise in some
6 confusion, which is not unusual for me. It must be because I
7 was not clear in the position we were taking earlier this
8 morning before Mr. Butner joined us.

9 But our view is that even -- with regard
10 to release conditions, even if the sheriff were for some
11 reason to do everything they said they were willing to do
12 today, we believe that the record now supports the idea that
13 that is insufficient for Mr. DeMocker's case.

14 THE COURT: I recognize that is your belief.

15 MR. SEARS: Thank you. And we were prepared,
16 if the Court had time and Mr. Butner were so inclined, to go
17 ahead with that hearing that you would propose for next
18 Friday, and just assume for purposes of that, that the
19 sheriff will make the changes that they have suggested they
20 would make. We are ready to do that now, if you are and the
21 State is.

22 THE COURT: I am not ready to do that now. I
23 will give them some time to show me that what they say they
24 are willing to do, they are actually going to do, and can't
25 do that with the current state of affairs. And I guess at

1 this point I am not willing to say that the Sixth Amendment
2 would require the modification you are seeking if they do
3 everything that they say that they are willing to do.

4 So I would like to take up the issues of
5 what you are still missing and what the State is able to or
6 has provided versus what they have not provided so far.

7 MS. CHAPMAN: Your Honor, going through the
8 motion --

9 THE COURT: Miss Chapman.

10 MS. CHAPMAN: Playing musical chairs here.

11 THE COURT: No problem. And I certainly don't
12 have any problem with you addressing that, rather than
13 Mr. Sears addressing the issues, because I recognize that in
14 the past you have been the focal point of making sure the
15 discovery is in and that sort of thing.

16 Mr. Butner, if you at any time have
17 trouble hearing Miss Chapman because you are appearing
18 telephonically, please let me know and I'll either have her
19 move closer to where the phone is or speak up a little
20 louder.

21 MR. BUTNER: I will do that, Judge. Thank
22 you.

23 THE COURT: Miss Chapman.

24 MS. CHAPMAN: Your Honor, I guess, just by
25 category, I think what the State said with respect to

1 criminal history of witnesses, the cell phone data and expert
2 access, the 15.1 compliance regarding experts, the indexing
3 systems request, and the D.P.S. information that we requested
4 disclosure on, the response, as I read it, was that they
5 would get to it eventually, that they were not prepared to
6 comply with those requests at this time, with the exception
7 that apparently some of the D.P.S. disclosure would be made
8 tomorrow -- or today, excuse me, tomorrow in their response,
9 with the disclosure that was anticipated today.

10 All of these requests have been pending.
11 And in the original motion, I went through a chronology, at
12 least to some extent, about when we originally asked for
13 these. With three and a half months pending before trial, we
14 don't think there is any reason why they shouldn't be in a
15 position to comply. We need access to the disclosure that we
16 are requesting and to the disclosure that is required under
17 15.1 to prepare ourselves and to prepare our experts for
18 trial, which is now less than three and a half months away.

19 So with respect to those categories of
20 documents, we would request that you enter an order for them
21 to comply and produce and disclose whatever it is that falls
22 within those categories by January 25th.

23 There are two other categories that I
24 broke out in the reply. And I could address those now, or
25 would you like to take it one step at a time?

1 THE COURT: Mr. Butner.

2 MR. BUTNER: Well, Judge, first of all, I
3 haven't even seen the reply. And I thought that basically
4 this was going to be argued at a later time. I mean, I can
5 argue it at this point in time. I have the copy of the
6 State's response in front of me. I do not have the reply, as
7 I stated. And quite frankly, it would help me to be able to
8 confer with my assistant, Deb Cowell, before I argue this,
9 because she is the person that works between me and some of
10 the providers, so to speak, of the disclosure materials,
11 particularly the lab. And so I am not exactly in a position
12 to say with specificity what has been provided and what
13 remains to be provided.

14 THE COURT: Let me take a brief recess then,
15 let you speak with your assistant, who is in the room, and I
16 will provide her my copy of the reply, so that she can advise
17 you -- she indicates she has the reply, and then you can
18 answer in a more sensible fashion.

19 MR. BUTNER: I appreciate that.

20 THE COURT: I will put you on hold, and when
21 she is done advising you of what newly has changed or what
22 recently has changed or what the status quo is, we can go
23 back on the record, because I can't let her, obviously,
24 represent the County Attorney's office or the State.

25 MR. BUTNER: No, I wouldn't want that either,

1 Judge. Thank you.

2 THE COURT: Put you on hold. I will take
3 another recess.

4 (Brief recess.)

5 THE COURT: Record can reflect defendant is
6 still present and his counsel and Mr. Butner appearing by
7 telephone on behalf of the State.

8 We are back in the courtroom after having
9 given Mr. Butner and his paralegal a chance to get updated on
10 the reply that was filed. We did fax over a copy so that
11 Mr. Butner has that now, and has had a chance to consult.

12 Back to you, Mr. Butner.

13 MR. BUTNER: Well, Judge, I am prepared to
14 argue the motions at this point in time, or the motion I
15 should say. Do you wish to hear from me first?

16 THE COURT: I heard from Miss Chapman. She
17 lumped the first set together of things that had been on the
18 table for a while and what was being requested, and I think
19 there is still some other things that she would like to
20 address, but we can take it kind of in that fashion, if you
21 want to address it in that way.

22 MR. BUTNER: Okay. Starting with, I guess,
23 the criminal history of witnesses, Judge. We can start
24 running criminal history even as we speak, but I don't think
25 it makes a lot of sense to run criminal history of witnesses

1 that the State is not going to call. I have not finished
2 culling my witness list to make a decision as to who exactly
3 the State is going to call at trial. I think that is going
4 to take me another 30 days, to be quite frank. And at that
5 time I would be prepared to provide the defense with a list
6 of the witnesses that the State is going to call at trial,
7 along with the criminal history on all of those witnesses.

8 That is basically the State's response in
9 regard to, No. 1, the criminal history of witnesses.

10 Should I go down the list in regard to
11 all of the other items, or do you want to take this one at a
12 time?

13 THE COURT: Let's take them one at a time,
14 then.

15 Miss Chapman, I presume you are going to
16 rely on what you have already recited. You think at this
17 point, if I may assume, that if there is still a possibility
18 at this point that they are going to be called, you want the
19 criminal history?

20 MS. CHAPMAN: That's correct, Your Honor, and
21 also I think you had earlier asked the State to cull down
22 their witness list. They provided us a culled witness list.
23 It still has 239 witnesses and 18 experts listed on it, and
24 at three and a half months away, we need to know who they
25 intend to call so we can schedule our interviews and prepare

1 for trial.

2 THE COURT: In terms of the criminal history,
3 I will go ahead and order that that be provided no later than
4 Friday of next week. And if that is culled or unculted, as
5 the terminology is being used, so be it. State needs to
6 provide the criminal history on those persons who they intend
7 to call at the time of the trial no later than next Friday.

8 Next item that you think there may be
9 some dispute over.

10 MS. CHAPMAN: Your Honor, I guess just going
11 down the list was the cell phone data and our request to have
12 the cell phones transferred to our expert for examination.

13 My understanding, again, is that the
14 State says they are not prepared to do that. We have
15 identified an expert, and with three and a half months to go,
16 and with them having had these cell phones in their
17 possession for over 15 months, we think it is entirely
18 appropriate for them to both disclose the remaining
19 information to us and provide the cell phones to our expert
20 now.

21 THE COURT: Is the status quo now the same in
22 which it was in your motion, or have you since obtained the
23 cell phone and tower information that you gave me example of?

24 MS. CHAPMAN: I have received no additional
25 information since the filing of the original motion.

1 THE COURT: Mr. Butner.

2 MR. BUTNER: Judge, in regard to the cell
3 phone and tower information, if I understand what she is
4 talking about, first of all, we have already provided all of
5 the cell phone and tower information that the State
6 possesses, with the exception of some large maps, and I am
7 not sure exactly what these are like, but they are in the
8 possession of sheriff's evidence people. And we recited in
9 our disclosure that they were available for viewing and, if
10 necessary, somehow copying by the defense. We don't know how
11 to copy them. They are too large to do. That is basically
12 it. They are available in evidence for viewing. That is
13 what we have been provided from the cell phone people,
14 Verizon, et cetera.

15 In regard to the records concerning the
16 cell phone towers and so forth, that has already been
17 provided, I believe, on disk disclosure to the defense as we
18 got it from the lab.

19 In regard to the phones themselves, I
20 think they are done, and if they are not done, they certainly
21 will be done by the end of next week.

22 THE COURT: So arrangements can be made. If I
23 enter an order that the defense receive them by Friday the
24 29th, you think that is plausible?

25 MR. BUTNER: Yes, I do, Judge.

1 THE COURT: Miss Chapman.

2 MS. CHAPMAN: My understanding is that some of
3 the cell tower disclosure information that the State received
4 was from Verizon. It was referred to in some of the
5 disclosure we have. I have not seen that in any of the
6 disclosure. If it has been disclosed, I would like the Bates
7 numbers identified or the CD identified.

8 The second issue is that as some of the
9 disclosure was produced, it had been altered from the state
10 in which it was provided to the State from Verizon. So, we
11 need the original production as it was disclosed to the
12 State. That is what we are told by the experts who have
13 looked at the materials that were sent to us.

14 THE COURT: Do you have corresponding Bates
15 numbers or documentation of which computer disks have that
16 information that you think has been altered?

17 MS. CHAPMAN: Yes, I do.

18 THE COURT: I will --

19 MR. BUTNER: Judge, if I might.

20 THE COURT: Mr. Butner.

21 MR. BUTNER: To my understanding, nothing has
22 been altered. We got it from the lab and provided it as we
23 received it.

24 THE COURT: All right. I will order the
25 defense to provide information on those items by Bates number

1 or CD that their experts believe may have been altered. I
2 will order original copies of those of what the State
3 received. And with regard to the Bates numbers, I will
4 direct the parties communicate with each other before next
5 Friday to identify what the Bates numbers are on the cell
6 phone information, that arrangements be made so that the
7 defense -- a member of the defense team, either a designated
8 lawyer or investigator can access the large maps that
9 Mr. Butner was referring to that the sheriff's office is
10 willing to allow them to access, so that they can document in
11 a fashion of photography, or whatever other manner of
12 documentation that they believe is necessary, those items.

13 I am not going to require duplication of
14 materials that are not possibly able to be duplicated. But
15 if they are on large maps and can be digitally photographed,
16 for example, then the access that the State is going to give
17 the defense should accommodate such recording.

18 Other issues with regard to the cell
19 phones, other than what I have addressed?

20 MS. CHAPMAN: I think that covers it.

21 THE COURT: Next item.

22 MS. CHAPMAN: The 15.1 compliance regarding
23 experts. The rule requires that the State provide a list of
24 documents it intends to rely on with respect to each witness
25 and with respect to each aggravator. We have received no

1 list for any of the 18 designated experts from the State.
2 That may be part of what was supposed to be included in the
3 disclosure we were going to receive today, but I am not
4 certain of that.

5 THE COURT: Maybe Mr. Butner can address
6 whether that is coming today.

7 Mr. Butner.

8 MR. BUTNER: Judge, in regard to expert
9 Mr. Echols, which is certainly the primary person that
10 surrounds, so to speak, we have Bates numbered a lot of the
11 stuff that he relied upon. We have incomplete bank account
12 records and credit card records, and are attempting to
13 acquire the complete records, and then Bates stamp all of
14 those records. We believe we will have all of that stuff
15 acquired and Bates stamped and provided to the defense by
16 February the 12th.

17 THE COURT: Back to you on that issue. And if
18 it is not Mr. Echols and there is some other individuals that
19 you are concerned about, if you would let me know that as
20 well.

21 MS. CHAPMAN: Well, Your Honor, there are, as
22 I mentioned, 18 identified experts in the State's latest
23 disclosure. We believe that this list in compliance is
24 required with respect to all of the experts, what documents
25 they intend to rely on. And with respect to the aggravation

1 phase, which aggravators they intend to rely on with respect
2 to which document.

3 THE COURT: You don't think that you have
4 Bates identified information on what they are relying on to
5 date?

6 MS. CHAPMAN: We don't have any Bates number
7 list for any experts that have been identified by the State,
8 period.

9 And I would say that with respect to
10 Mr. Echols, he has already testified and provided reports.
11 If they need to supplement the list on February 12, that is
12 fine, but we believe the list should be made available, and
13 in fact, I think the Court ordered that the list be made
14 available immediately after when Mr. Echols testified here.

15 THE COURT: I think I did, too.

16 I will order, Mr. Butner, that the State,
17 your staff, provide to the defense the Bates numbers of the
18 documents upon which each expert is relying. I am not saying
19 that you have to re-duplicate those items, but they have to
20 be identified by Bates number as far as what documents have
21 been relied on by the experts for what you are intending to
22 use in terms of experts at the time of the trial, and that
23 that be accomplished by next Friday also.

24 With regard, specifically, to Mr. Echols,
25 you may supplement with Bates numbered identification, the

1 documentation upon which he will rely at trial by
2 February 12, but I think it is appropriate to follow the
3 order that I already entered with regard to identifying what
4 he has relied upon already in reaching his conclusions.

5 I understand and recall that the items
6 were identified by a topic heading, but my recollection is
7 that they weren't listed by a Bates number. And I think I
8 allowed you to simply reBates number those items that you
9 already had and knew that he had relied upon without having
10 to dive back in and figure out what the Bates number was, so
11 that they can start collating that information. So I will
12 rely on that. That has to be filed and delivered to the
13 defense no later than next Friday.

14 MR. BUTNER: Just to clarify on that, we are
15 going to do that a little bit later today in regard to
16 Mr. Echols' stuff, but I wanted to explain that we are
17 identifying a bunch of account records that are still not
18 complete, and as I stated, we will have that Bates numbered
19 and to the defense by the 12th.

20 THE COURT: Thank you.

21 Ms. Chapman.

22 MS. CHAPMAN: Your Honor, if I could also
23 request that to the extent that any -- because about half of
24 the documentation we have received is not Bates labeled. To
25 the extent that the experts have relied on any documentation

1 that is not Bates labeled, if it could be identified by
2 disclosure, so that we would at least be able to locate it, I
3 would ask that also be included.

4 THE COURT: If you can accommodate that
5 request, I will go ahead and order that. If you have already
6 disclosed what was relied upon but it did not contain a Bates
7 number, you may simply refer the defense to the items by the
8 disclosure identifiers that already exist. So when it was
9 disclosed and what page of the disclosure in some fashion
10 that allows them to identify, in what they already have, what
11 the experts are relying on.

12 MR. BUTNER: Thank you.

13 THE COURT: You can accommodate it in that
14 regard. I think they just need to know what each expert is
15 relying on. That is for purposes of both guilt or innocence
16 phase and aggravating penalty phase, witnesses or experts.

17 Miss Chapman.

18 MS. CHAPMAN: The next item, Your Honor, is
19 with respect to indexing systems. In the disclosure we have
20 one report of a keyboard search, which is a one-time search
21 and the State indexing system. We have asked Mr. Butner to
22 identify what testing or what searching has been done on
23 which data bases with respect to a number of evidence items
24 and any swabs from those items, and we haven't received any
25 response to that request.

1 THE COURT: Mr. Butner.

2 MR. BUTNER: Judge, we are attempting to get
3 that. I think it is primarily, if I understand correctly
4 what it is, refers to stuff that the D.P.S. lab does with
5 searches through the various repositories for DNA
6 information.

7 MS. CHAPMAN: It relates to both DNA and
8 fingerprint.

9 THE COURT: DNA and fingerprint, if you didn't
10 hear that.

11 MR. BUTNER: Okay. I did hear that. That is
12 what I thought. We have been in contact with the lab about
13 that. We haven't got the complete story back on that yet.
14 We are still in the process. We should be able to have that
15 accomplished by next Friday.

16 THE COURT: I will order it be provided by
17 next Friday, then, the 29th of January.

18 Next?

19 MS. CHAPMAN: Next item is with respect to
20 some specific requested D.P.S. disclosure. That request was
21 made, I think, on December 17, and it is identified Items 1
22 through 10 on Page 6 of the original motion. Regards some
23 lab protocols from D.P.S. and specific chain of custody
24 documents, some notes, photographs, data files, other things
25 that were missing from the original and subsequent

1 productions that we received from D.P.S.

2 THE COURT: What is still missing?

3 MS. CHAPMAN: I haven't received anything
4 since the time of filing this motion. So all Items 1 through
5 10 are missing.

6 THE COURT: Mr. Butner, is something in the
7 works to be provided today on No. 7 at the bottom of Page 5,
8 top of Page 6, of the original motion, the D.P.S. material?

9 MR. BUTNER: I don't know for sure on that,
10 Judge. I would expect so. I did not confer with my
11 paralegal on that. I thought that maybe we had gotten that
12 taken care of, but apparently not.

13 MS. CHAPMAN: My understanding, Your Honor, is
14 that that is in process.

15 THE COURT: From a discussion at the paralegal
16 level or investigator level?

17 MS. CHAPMAN: Yes.

18 THE COURT: Is it plausible that that
19 information will be received by next Friday?

20 MR. BUTNER: I assume you are addressing that
21 to me, Judge.

22 THE COURT: I am addressing that to you, but I
23 will take an answer from whoever I can get it from.

24 MR. BUTNER: I think it is plausible. And I
25 hope my paralegal is visible and indicates that that is a

1 yes.

2 THE COURT: She is and did.

3 MR. BUTNER: Okay, good.

4 THE COURT: Then the items that are covered by
5 No. 7 of the original motion are ordered to be provided to
6 the defense no later than -- obviously, you can do it
7 before -- but no later than Friday, January 29, 2010.

8 MS. CHAPMAN: Your Honor, moving on, there is
9 a category that is sort of interrelated with respect to the
10 sheriff's office reports. The last dated report that we have
11 is September 29, 2009. We have received a lot of disclosure
12 since that date, including at least ten interviews that have
13 no corresponding reports.

14 My understanding is that there have been
15 no supplemental reports produced. Reports have been produced
16 for every other interview, so I don't know what the hold up
17 is with respect to getting those, but we would ask that they
18 be completed and provided to us. Several months have passed
19 now since the end of September, and interviews are being
20 conducted and disclosure continues to come in.

21 THE COURT: This is No. 9 of your list on
22 Page 7?

23 MS. CHAPMAN: Yes. It relates to No. 9 and
24 then I think it also relates to No. 6, which is reports
25 regarding witnesses. I think these are inter-related

1 requests.

2 THE COURT: So, No. 6 and No. 9.

3 Mr. Butner.

4 MR. BUTNER: Judge, we are in possession of
5 109 Yavapai County Sheriff's Office supplements, and I think
6 all of those have been provided to the defense. As soon as
7 we get a supplement, we disclose it and provide it to the
8 defense. When I say "as soon as," within a week. And I
9 don't know. I don't know what is going on in regard to
10 whether they are preparing supplements or not, but as soon as
11 we get them, we disclose them.

12 MS. CHAPMAN: Your Honor, I think the last one
13 that we had disclosed was disclosed in December. It was a
14 report from July. That kind of delay with trial approaching,
15 we are not going to receive them.

16 MR. BUTNER: Let me address that with
17 specificity, Judge.

18 THE COURT: Go ahead.

19 MR. BUTNER: That particular report for some
20 bizarre reason had been waiting for approval and was approved
21 very late. I don't know why. But as soon as we got it -- we
22 were wondering what happened to it. In fact, we were the
23 ones that discovered it was missing and asked the sheriff's
24 office where is this particular report? They found it. It
25 was languishing someplace. And as soon as we got it we

1 disclosed it to the defense.

2 With 109 supplements, and that one
3 report, and they point that out and we, in fact, had
4 disclosed it to them already, that just smacks of being a
5 little bit unfair. We are disclosing this stuff as fast as
6 we can get it, and they know it.

7 MS. CHAPMAN: Your Honor, I am not complaining
8 about the rate at which they disclose it once they get it. I
9 am complaining about the lag of time between when the reports
10 are prepared and disclosed to them. The bottom line is we
11 need the reports. We haven't received any since the end of
12 September.

13 THE COURT: I will direct that the County
14 Attorney's staff make inquiry with the sheriff's office to
15 determine what reports, if any, have been written regarding
16 actions that have taken place subsequent to September 9,
17 2009, through this date today, that you make inquiry to see
18 if there are some other languishing reports, in terms of the
19 investigation, and that those be provided -- that you track
20 that those be provided to you and be subject to disclosure
21 upon your receipt of them no later than -- as your practice
22 has been, to immediately copy them and forward them onto the
23 defense. We are getting up toward the trial and so that
24 needs to be accomplished.

25 If you can convey in the strongest of

1 terms to the sheriff's office, recognizing some limits of
2 your ability to control. You still represent the State, and
3 the sheriff, I understand, does not take orders from the
4 County Attorney or from her deputies, but I think we are
5 getting too close to trial to have a lot of stuff that is
6 still out there remaining to be disclosed.

7 MR. BUTNER: I understand, Judge, and we
8 continue to stay on them, so to speak, to make sure that we
9 are getting the reports as promptly as possible and
10 disclosing them as promptly as possible.

11 THE COURT: Let them know that they are
12 impacting their case. And to the extent that information is
13 late disclosed, they are going to be up against having the
14 information precluded. If it is of assistance to them, they
15 are not going to like that. If it is of assistance to the
16 defense, I am not going to bar the defense from using things
17 that are disclosed. But I think the delay is providing
18 disadvantage to the lawyers who are trying to try the case.

19 So I will order that all reports be
20 disclosed no later than February 6, and any that are not
21 disclosed I will likely preclude, preclude the information
22 that is described by the report.

23 MR. BUTNER: Judge, if I might respond to
24 that.

25 THE COURT: You may.

1 MR. BUTNER: Okay.

2 THE COURT: Before you do, I recognize that
3 the parties have been making arrangements, for example, with
4 labs to test in commonalty some of the remaining exhibits.
5 And so to the extent that a report hasn't been prepared with
6 regard to that, I will probably not preclude that
7 information. But if there is anything that is disclosed that
8 pertains to what has already been done before today, and it
9 is not disclosed by the 6th of February, I am probably going
10 to preclude it.

11 MR. BUTNER: Okay. That clarified exactly
12 what I wish to draw to the Court's attention. I appreciate
13 that.

14 THE COURT: Thank you.

15 MR. BUTNER: Thank you.

16 THE COURT: Miss Chapman, next?

17 MS. CHAPMAN: Your Honor, I think that the
18 remaining item here is with respect to Item No. 5, which are
19 the defendant's statements. And the State's reply is that it
20 intends to rely on specific statements, and then all of the
21 statements that is provided to us in Mr. DeMocker's jail
22 calls. I think you heard the number is over 2700 calls. We
23 had parts of them up through August transcribed. That is
24 approximately 25,000 pages of transcription. That leaves us
25 with several other months. It is an incredibly costly and

1 expensive and time consuming process. And we would ask that
2 the State identify -- let me back up for a minute.

3 We also don't have any reports or
4 summaries or other documentation about what is happening with
5 those calls, and do have some information that they are being
6 listened to because search warrants have arisen as a result
7 of some of those conversations, so we would like to request
8 some of those reports and summaries. And also an
9 identification of what, if any, of those calls that the State
10 actually intends to rely on.

11 THE COURT: Mr. Butner.

12 MR. BUTNER: Judge, there were some summaries
13 done early on. It became overly burdensome. They are not
14 really doing summaries anymore. We can provide them with the
15 summaries that have been done, but there aren't summaries
16 being done and haven't been done for quite some time. We are
17 providing the conversations. I will request that we get an
18 updated amount of the conversations to the defense. It would
19 seem to me that we can provide them with the recorded
20 conversations through the end of December. I think that is
21 about as much as we have looked at, at this point anyway, and
22 we will do that. We can do that, I suppose, by the end of
23 next week. But in terms of reports and things of that
24 nature, those aren't being done.

25 THE COURT: How do you know you intend to use

1 any of them if they haven't been listened to, if they haven't
2 been summarized, if there is nothing relevant on them to nail
3 down which ones you are going to use or not use?

4 MR. BUTNER: Judge, I didn't say they haven't
5 been listened to. They have been listened to. And
6 ultimately I am going to have to go back and listen to some
7 jail phone calls and pick out the ones that we need to use.

8 THE COURT: If they have been listened to, if
9 they have some relevant information on them, then hasn't
10 there been some type of reporting that would identify which
11 ones may have relevancy from those that are simply, pardon
12 the expression, background noise to the case?

13 MR. BUTNER: Like I said, there were some
14 summaries done early on, but there have not been summaries
15 done as of late.

16 THE COURT: Those for which summaries have
17 been done, is there relevant information on them that you
18 think you are going to use?

19 MR. BUTNER: Not very much, Judge. We will
20 disclose the summaries that have been done, as I stated.

21 THE COURT: And those that do have information
22 that is relevant and possibly admissible, can you identify
23 the call or date or time or CD, some fashion of identifying
24 what it is the information is that you are going to want to
25 propose putting in front of the jury?

1 MR. BUTNER: Understand the people that have
2 been listening to these jail phone calls, and this is why
3 there aren't many summaries done, are volunteers, so to
4 speak, for the most part. On occasion some deputies that
5 were on leave, or something of that nature, limited duty kind
6 of deputies that listen to the phone calls. They have not
7 been doing reports on them. I am going to have to listen to
8 what a volunteer thinks might have been important. And I
9 don't have summaries of that stuff. To the extent that I do
10 have summaries from early on, I will do that.

11 THE COURT: How many items are there, do you
12 think, out of the 2700 or so that I am told exist?

13 MR. BUTNER: I have no idea.

14 MS. CHAPMAN: We haven't received any
15 summaries, so the record is clear, of any phone calls.

16 THE COURT: Okay. And when can you provide
17 the summaries and/or transcripts and/or notes that pertain to
18 these calls? When can you provide those to the defense?

19 MR. BUTNER: Well, I have never seen them,
20 Judge, so I really don't know. How about within -- let's
21 just say by February the 12th, I will be able to have
22 garnered that information, because I don't even know where to
23 ask at this point.

24 THE COURT: I guess that answer confuses me.
25 Do you need to consult with your staff at all for that

1 information?

2 MR. BUTNER: I don't think my staff knows
3 either. I think that information is, like I said, it was
4 being handled by volunteers. And so that is why I give to
5 the Court about, you know, several -- a couple of weeks here,
6 because I don't know where that information is. I don't know
7 what it is going to take to get it together.

8 THE COURT: All right. For those calls that
9 have been obtained through December 31st of 2009, I will
10 order that you identify in some clear fashion, which of those
11 items you intend to use. And because I am not privy to the
12 manner of how they have been disclosed so far, I guess I am
13 uncertain as to how to do it in any other fashion than
14 identifying the call by date and number and the proposed
15 information contained in that.

16 I think that for those calls that have
17 been obtained through the 31st of December by means of a
18 report that has already been done or a transcript, that you
19 provide that information, if it exists, to the defense no
20 later than the 6th of February. And if you intend to use any
21 of the calls, you will need to identify them that occurred --
22 those that occurred before December 31st, 2009, no later than
23 the same date, so that they don't have to type up a
24 transcript of every call that was ever made at great expense
25 and difficulty.

1 I imagine that most of this is, pardon
2 the expression, background noise to the case that has nothing
3 to do with the facts of the case and probably isn't relevant
4 to anything else. To the extent that you have these calls
5 and you intend -- if you have disclosed them and intend to
6 use them, they have to be duplicated. If they haven't been
7 duplicated, they must be duplicated and provided by the 6th.

8 And I did a somewhat arbitrary cutoff
9 with December 31st for the 6th, and I will go a week later to
10 the 13th for any that are in January through the 13th of
11 February. If you intend to use any of that, that has to be
12 identified so that all of them are identified by date, time,
13 and if possible, some other mechanism of identifying what CD
14 they are on -- if that is the manner of disclosure -- what CD
15 they are on by designation letter, number, however you folks
16 are designating them, or else they may be precluded from any
17 type of use at trial.

18 What next?

19 MS. CHAPMAN: Your Honor, I think that covers
20 the issues that were in the -- in this motion. There are
21 some other issues that we had talked about when we were here
22 last week that we would raise today, time permitting. I
23 don't know if you want to go to those, but I believe that
24 that covers all of the areas that were outlined in the
25 original motion to compel.

1 THE COURT: What else did you wish to discuss?

2 MS. CHAPMAN: Your Honor, Mr. Butner was
3 provided last Tuesday with a letter addressed to John Kennedy
4 and Ruth Kennedy, and he was going to advise us whether or
5 not he would agree to mail those letters. I haven't heard
6 whether he did mail those letters. So, that is the first
7 item.

8 THE COURT: Mr. Butner, the Kennedy letters?

9 MR. BUTNER: I have spoken personally with
10 John and Ruth Kennedy. Those letters are going to be mailed
11 today.

12 THE COURT: All right. Thank you.

13 MS. CHAPMAN: Your Honor, the other issue is
14 with respect to the pending 14 items that were being tested.
15 We did receive a report back from the lab. My understanding
16 is that we were going to receive information about any
17 additional tests that were going to be conducted with respect
18 to the 14 items. And we don't have information about whether
19 any additional testing is anticipated or going to be
20 performed. But we would like to have that information in
21 anticipation of the hearing that you set in early March,
22 where we intend to address the other DNA issues in our in
23 limine motion.

24 THE COURT: Mr. Butner.

25 MR. BUTNER: Judge, that information will be

1 provided to the defense. We are aware of our agreement to do
2 that. And I don't have that information readily at hand, but
3 we will let them know what additional testing is going to be
4 conducted and on the items upon which it is going to be
5 conducted.

6 THE COURT: We are getting to the point where
7 I guess we need to have some identification of the date by
8 which that information is going to be provided.

9 MR. BUTNER: I think that can be provided also
10 by January 29th. I would hope sooner, but certainly by
11 January 29th.

12 THE COURT: So ordered to be provided by
13 January 29.

14 By the way, Mr. Butner, I did a draft of
15 where I think I am in terms of the questionnaire. I provided
16 the draft to Mr. McGrane and Mr. Fields when they were here,
17 I think. I am not sure if they left it with your paralegal.
18 I am receiving a nod. And I would like both sides to take a
19 look at spelling, grammar and content of those. I would be
20 happy to e-mail that to the respective sides as well. So if
21 you prefer, I will send it by e-mail.

22 MR. BUTNER: That is fine, Judge. If my
23 paralegal has got it, I am sure I will get it.

24 MS. CHAPMAN: E-mail is fine with us.

25 THE COURT: E-mail would be appreciated. I

1 will do that.

2 MR. BUTNER: E-mail would be great. Thank
3 you.

4 THE COURT: I may -- I think I probably have
5 the contact information e-mails on my addresses that I have.
6 If I have any difficulty, I will get back in touch with the
7 respective sides.

8 MS. CHAPMAN: Thank you, Your Honor. They are
9 at the top of the pleadings underneath our address.

10 THE COURT: Probably copy both Mr. Sears and
11 you, Miss Chapman.

12 MS. CHAPMAN: That would be great, Your Honor.
13 Thank you.

14 THE COURT: There is not -- in the age of
15 electronics, there is not a great deal of difficulty adding
16 an address to what I send.

17 MS. CHAPMAN: Your Honor, I think the last
18 thing, just to be clear, Mr. Hammond reminds me that although
19 you have now provided a deadline for the State to provide
20 these reports from the sheriff's office, that we still may
21 have objections and will have objections to any late
22 disclosure, even given this additional time that you have
23 provided them today. So we are not waiving any objections
24 that we have to that disclosure under the rules or otherwise.

25 THE COURT: I understand.

1 Anything else that you think we need to
2 cover today that we haven't?

3 MS. CHAPMAN: Not from our end, Your Honor.

4 THE COURT: Mr. Butner?

5 MR. BUTNER: I can't think of anything
6 further, Judge.

7 THE COURT: Question: I was previously intent
8 on holding a further pretrial conference next Friday at 1:30.
9 Obviously, I don't want to multiply appearances for the
10 parties, but still need to cover things that are pending
11 preliminary to the trial. Do you still wish to have such a
12 meeting on Friday, and do you wish to have Mr. DeMocker
13 present at it, and do you wish to have appearances allowed
14 telephonically?

15 MR. SEARS: I think our position would be yes
16 to all three of those, Your Honor.

17 THE COURT: So, it would be negative with
18 regard to Mr. DeMocker being here without somebody with him
19 as far as --

20 MR. SEARS: One or more of us will be in court
21 with Mr. DeMocker next Friday.

22 THE COURT: I will confirm that we will have a
23 pretrial conference and, in particular, one of the things
24 that I am going to be addressing is -- or have you addressing
25 is what the status quo is by that time of what the sheriff's

1 office committed to do in connection with Mr. DeMocker's
2 access to materials by then.

3 MR. BUTNER: This Friday, January 29, Judge?

4 THE COURT: Yes, at 1:30. Do you wish to be
5 able to appear telephonically, or are you coming in person?

6 MR. BUTNER: I need to appear telephonically,
7 if I can at all possible.

8 THE COURT: You can. And I will have
9 Mr. DeMocker over personally then on Friday the 29th at 1:30
10 for a pretrial.

11 What other issues do you think I am going
12 to need to take up at that point, other than the continuing
13 issue on access of the materials and/or release?

14 MR. SEARS: In addition to those matters?

15 THE COURT: Yes.

16 MR. SEARS: I think it might be important,
17 Your Honor, to take up again the rest of the proposals
18 regarding jury selection. We will have an opportunity to
19 look carefully at the questionnaire that you circulated.

20 THE COURT: That was on my mind also with
21 regard to finalizing that, and you can see what I did with
22 some of the language and structure of how the questionnaire
23 was formed. And you may state anything else that you may
24 want to with regard to that.

25 MR. SEARS: We wanted to talk further about

1 scheduling and practices going forward as we get into April
2 and May.

3 THE COURT: Good. We will stand in recess.

4 Thank you.

5 (Whereupon, these proceedings were concluded.)

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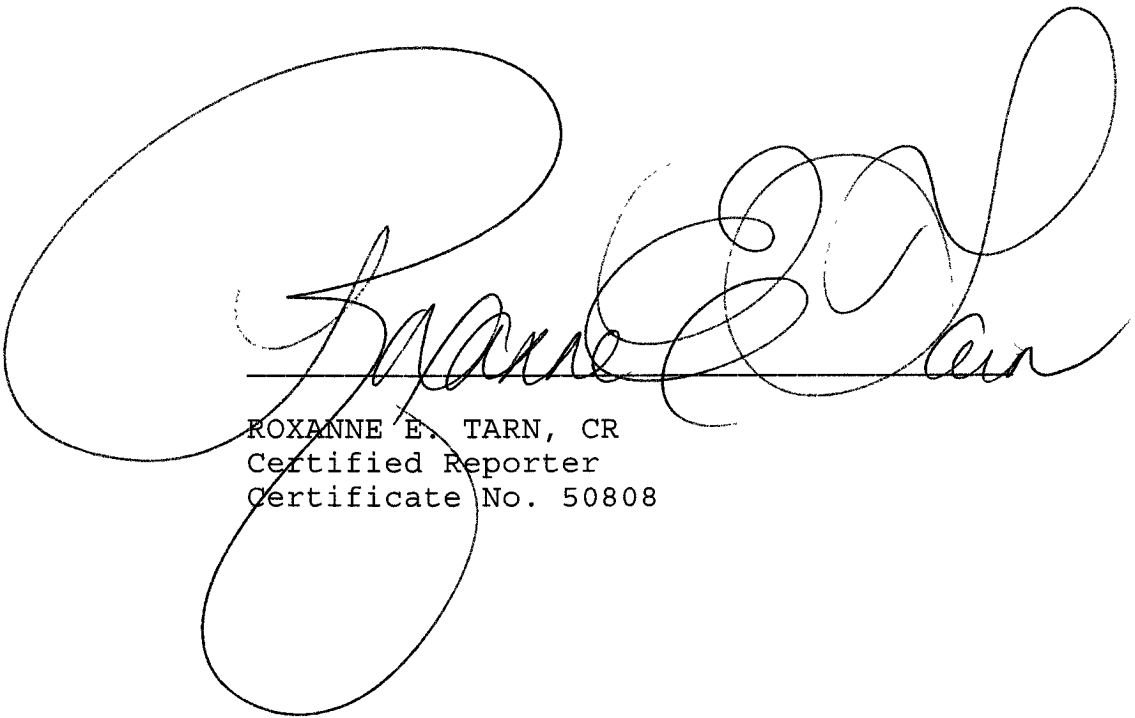
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C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter
in the State of Arizona, do hereby certify that the foregoing
pages 1 - 112 constitute a full, true, and accurate
transcript of the proceedings had in the foregoing matter,
all done to the best of my skill and ability.

SIGNED and dated this 26th day of January,
2010.



ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808